DOCKET

No. 07-8521 *** CAPITAL CASE ***
Vide 07-8519, 07-8520
Title: Edward Jerome Harbison, Petitioner
v.
Ricky Bell, Warden
Docketed: January 3, 2008
Lower Ct: United States Court of Appeals for the Sixth Circuit
Case Nos.: (07-5059)
Decision Date: September 27, 2007
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Dec 21 2007	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due February 4, 2008)
Feb 1 2008	Brief of respondent Ricky Bell, Warden in opposition filed.
Feb 11 2008	Reply of petitioner Edward Jerome Harbison filed. (Distributed)
Feb 14 2008	DISTRIBUTED for Conference of February 29, 2008.
Mar 3 2008	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
May 23 2008	Brief amicus curiae of United States filed.
Jun 4 2008	DISTRIBUTED for Conference of June 19, 2008.
Jun 23 2008	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Jul 1 2008	Letter from Respondent's Counsel
Jul 31 2008	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including September 8, 2008.
Aug 29 2008	Joint Motion to dispense with printing the joint appendix filed.
Sep 5 2008	Brief of respondent Ricky Bell, Warden, supporting reversal filed.
Sep 8 2008	Brief of petitioner Edward Jerome Harbison filed.
Sep 15 2008	Brief amici curiae of Former Governors filed.
Sep 15 2008	Brief amicus curiae of Constitution Project filed.
Oct 6 2008	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Oct 8 2008	Brief amicus curiae of United States in support of the judgment below filed.
Oct 15 2008	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae filed.
Oct 23 2008	Letter of counsel for the respondent in support of the motion of the Solicitor General for leave to participate in oral argument filed.
Nov 3 2008	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae GRANTED.
Nov 4 2008	CIRCULATED.
Nov 7 2008	SET FOR ARGUMENT ON Monday, January 12, 2009.
Nov 7 2008	Reply of petitioner Edward Jerome Harbison filed. (Distributed)
Nov 26 2008	Record received from the U.S.C.A. for the 6th Circuit. (1 binder)
Dec 5 2008	Record received from the U.S.D.C. for the Eastern District of Tennessee. (1 box)

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PETITION FOR WRIT OF CERTIORARI

No. 08-_____

IN THE SUPREME COURT OF THE UNITED STATES

JAMES BENJAMIN PUCKETT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

I. Did the Fifth Circuit violate the doctrines set forth in Santobello v. New York, 404 U.S. 257 (1971) when it applied a "plain error" standard of review to Defendant's appeal based on the government's admitted breach of the plea agreement and Defendant did not object to said breach at the time of sentencing?

II. Even if "plain error" is the correct standard of review when a defendant does not object at sentencing to the Government's breach of a plea agreement, did the Fifth Circuit err when it failed to find "plain error" was established when the breach of the plea agreement was admitted and the plea was obtained in exchange for clear promises that the Government failed to keep?

PARTIES

James Benjamin Puckett is the petitioner. The United States of America is the respondent.

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, James Benjamin Puckett, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit opinion is captioned as United States of America v. James Benjamin Puckett, 505 F.3d 377 (5th Cir. 2007). A copy of the opinion is attached as Appendix A. A Motion for Rehearing En Banc was denied on December 4, 2007. A copy of that decision is attached as Appendix B.

JURISDICTIONAL STATEMENT

The judgment and opinion of the United States Court of Appeals for the Fifth Circuit were filed on October 23, 2007. [Appendix A]. Defendant's Motion for Rehearing En Banc was denied on December 4, 2007 [Appendix B]. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISION INVOKED

Implicated in this case are the Fifth Amendment to the United States Constitution, which provides in relevant part that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; . . . nor be deprived of life, liberty, or property without due process of law . . . .

and the Sixth Amendment to the United States Constitution, which provides:

> This case involves the Sixth Amendment rights to criminal defendants " to assistance of counsel: "In all criminal prosecutions, the accused shall

> enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." U.S. Const. amend. VI.

Also implicated is Section 1 of the Fourteenth Amendment to the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The remainder of the statutory and regulatory provisions are set out in the appendices.

STATEMENT OF THE CASE

James Puckett was charged by indictment in the Northern District of Texas of violating 18 U.S.C. § 2113(a) and (d) (Bank Robbery) and 18 U.S.C. § 924(c)(1) (Firearm enhancement) for allegedly robbing a bank on April 4, 2002. Mr. Puckett was on post-conviction supervised release for three prior federal felony offenses[1] at the time of this alleged offense.

On September 3, 2003, Mr. Puckett pled guilty to both counts charged in this cause and executed a plea agreement and factual resume for these crimes that was accepted by United States District Judge Barefoot Sanders. Paragraph 8 of that agreement states: "The government has agreed that Puckett has demonstrated acceptance of responsibility and thereby qualifies for a three-level reduction in his offense level." There were no conditions attached to this plea agreement.

On September 4, 2003, The Government filed its Motion to Decrease Offense Level Pursuant to USSG § 3E1.1(b), requesting that the Court to decrease defendant's offense level by one additional level. In that Motion, the Government alleged in support of this Motion that "the Government agrees that the defendant has clearly demonstrated acceptance of responsibility for his offense[.]" This Motion includes the language however, that the government "reserved the right to withdraw this motion in

[1] *See United States v. Puckett*, 3:97-CR-093-H(01); *United States v. Puckett*, 3:97-CR-175-H(01); and

the event that the defendant engages in conduct inconsistent with his acceptance of responsibility."

At sentencing however, the Government stated: "Your honor, to the acceptance of responsibility, that third level, which, of course, does not come into play unless the court finds that he should receive the downward - - the first two levels, that was made a long time ago. That was before the offense that was committed that Ms. [HARBGS/] included in her presentence report and we would object to him receiving *any acceptance or responsibility points at this point.*" Defendant did not object to the Government's breach of the plea agreement, but objected on other grounds. Judge Sanders did not grant Defendant the three acceptance points in imposing sentence.

On appeal, Defendant raised the following issues: (1) whether the district court erred in denying Defendant's request to withdraw his guilty plea; (2) whether the Government breached the plea agreement, thus entitling Defendant to withdraw his guilty plea (3); whether the district court erred in denying Defendant acceptance points for allegedly taking part in a new criminal venture while incarcerated for this cause; and (4) whether the district erred in denying Defendant's Motion for Ineffective Assistance of counsel.

United States v. Puckett, 3:97-CR-176-H(01).

In response, the Government admitted that it breached the plea agreement at sentencing: "The government does not dispute that the prosecutor's objection at sentencing to Puckett receiving a reduction for acceptance of responsibility was contrary to the government's obligation as stated in the Plea Agreement." Appellee's Brief to the Fifth Circuit at 21. Despite this admission, the Fifth Circuit denied all of the Defendant's arguments on appeal and affirmed. Defendant petitioned for a rehearing en banc that was denied.

REASON FOR GRANTING THE WRIT

I. The Fifth Circuit violated Santobello when it applied a "plain error" standard of review to Defendant's appeal based on the government's admitted breach of the plea agreement and Defendant did not object to said breach at the time of sentencing.

Federal Rule of Criminal Procedure 52(b) provides: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." The First[2], Fourth[3], Fifth[4], Sixth[5], Seventh[6], Eighth[7], Ninth[8],

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[2] See United States v. Saxena, 229 F.3d 1, 5 (1st Cir. 2000)("When a defendant has knowledge of conduct ostensibly amounting to a breach of a plea agreement, yet does not bring that breach to the attention of the sentencing court, we review only for plain error").

[3] See United States v. McQueen, 108 F.3d 64, 65-66 (4th Circuit 1997)("McQueen asserts that the Government's failure to argue the plea agreement terms to the sentencing court amounted to a breach of the plea agreement. . . . Because McQueen raises this issue for the first time on appeal, however, we must affirm the sentence imposed by the district court unless we find plain error").

[4] See United States v. Munoz, 408 F.3d 222, 226 (5th Cir. 2005)("Because Munoz did not object [to the breach of the plea agreement] at sentencing, the court reviews the argument for plain error").

Eleventh[9] and the D.C. Circuit[10] apply some form of a "plain error" standard where a Defendant failed to object at sentencing to the Government's breach of a plea agreement, then sought to raise it on direct appeal. The Second[11], Third[12] and Tenth[13]

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[5] See United States v. Barnes, 278 F.3d 644; 646 (6th Cir. 2002)("We review the question of whether the government's conduct, or lack thereof, violated its plea agreement with a defendant de novo. . . . However, because Defendant failed to object after the government did not offer a recommendation at sentencing, Defendant waived his right to appeal any breach of the plea agreement, and a plain error analysis thus guides this Court's review")(citation omitted).

[6] See United States v. Hicks, 129 F.3d 376, 378 (7th Cir. 1997)("A defendant's failure to allege the breach of a plea agreement at sentencing waives the matter for appeal. . . . We will, however, reverse even on a relinquished ground if the district court committed plain error").

[7] The Eighth Circuit holds that a Defendant's failure to object at sentencing to the Government's breach of a plea agreement waives this issue. See United States v. Cohen, 60 F.3d 460, 462 (8th Cir. 1995). However, a "plain error" standard has also been applied in unpublished decisions. See United States v. Gaines, 187 Fed.Appx. 658 (8th Cir. 2006)(When Defendant failed to object to the Government's breach of the plea agreement at sentencing, "[e]ven assuming there was no waiver, the matter of an alleged breach was not properly preserved, and we would review the claim only for plain error").

[8] See United States v. Maldonado, 215 F.3d 1046, 1051 (9th Cir. 2000)("Because Maldonado waived the breach of plea agreement issue, we review his claim for plain error").

[9] See United States v. Romano, 314 F.3d 1279, 1281 (11th Cir. 2002)("[T]he Government notes that appellant failed to raise [the issue of the Government's breach of the plea agreement] before the district court. The Government is right; hence, we review appellant's contention for plain error").

[10] See In re Sealed Case, 356 F.3d 313, 316-317 (D.C.Cir. 2004)("[W]e join the substantial majority of circuits holding that when a defendant raises a claim of breached plea bargain for the first time on appeal, the reviewing court should apply a plain error standard of review consistent with Fed. R. Crim. P. 52(b)").

[11] See United States v. Griffin, 510 F.3d 354, 360 (2nd Cir. 2007)(citations omitted). The Second Circuit applies a "de novo" review in situations where the Defendant does not object to breaches of the plea agreement at sentencing, noting "Because the government ordinarily has certain awesome advantages in bargaining power, any ambiguities in the agreement must be resolved in favor of the defendant."....Where plea agreements are involved, the government must take particular "'care in fulfilling its responsibilities.'" Id.

[12] See United States v. Rivera, 365 F.3d 213 (3rd Cir. 2004)(Breach of plea agreement even if not raised at sentencing subject to "de novo" review, rejecting "plain error" standard articulated in Rule 52(b)).

apply a "de novo" review regardless of whether the Defendant objected at sentencing to the breach. The conflict among the Circuits is real, and raises significant practical issues for Defendants who seek to challenge a prosecutor's breach on appeal after failing to raise this issue at sentencing.

The "plain error" standard is defined as: "[B]efore an appellate court can correct an error not raised at trial, there must be (1) "error," (2) that is "plain," and (3) that "affects substantial rights." . . . If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error ""seriously affects the fairness, integrity, or public reputation of judicial proceedings."" Johnson v. United States, 520 U.S. 461, 467 (1997), citing United States v. Olano, 507 U.S. 725,732 (1993)(further citations omitted). "The plain error standard is very high, requiring that the error affect a substantial right of the defendant. . . . "A court of appeals may correct a plain, forfeited error affecting substantial rights 'only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings.'" United States v. Thayer, 204 F.3d 1352, 1356 (11th Cir. 2000)(citations omitted).

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[13] See United States v. Courtois, 131 F.3d 937, 938, n.2 (10th Cir. 1997)("Because the failure to object to an alleged plea agreement does not waive the issue, we may review the defendant's claim de novo rather than for plain error").

Conversely, under a "de novo" standard, the Court stands in the shoes of the trial court- if a breach occurred, then these courts have held that a remand to the trial court for either sentencing or a withdrawal of the plea is necessary. This evaluation is set out clearly in United States v. Moscahlaidis, 868 F.2d 1357, 1360 (10th Cir. 1989):

> The facts of the case, if disputed, are determined by the district court and our review of those findings is limited to a clearly erroneous standard. *United States v. Carrillo*, 709 F.2d 35 (9th Cir. 1983). Whether the government's conduct violates the terms of the plea agreement is a question of law and our review is plenary. *United States v. Miller*, 565 F.2d 1273 (3d Cir. 1977), *cert. denied*, 436 U.S. 959, 57 L. Ed. 2d 1125, 98 S. Ct. 3076 (1978); *United States v. Crusco*, 536 F.2d 21 (3d Cir. 1976). As to the third question, the Supreme Court, in *Santobello v. New York*, 404 U.S. 257, 30 L. Ed. 2d 427, 92 S. Ct. 495 (1971), concluded that once the court finds a breach of the plea agreement by the government the case must be remanded for either resentencing or withdrawal of appellant's guilty plea. Under these standards, we review this case.

In the seminal case of Santobello v. New York, 404 U.S. 257 (1972), the Defendant attempted to withdraw his guilty plea when the prosecutor reneged on an earlier promise to make no recommendation as to the sentence to be imposed by the Judge. In overturning the conviction, the United States Supreme Court held directly: "[A] constant factor is that when a plea agreement rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." Id. at 262.

The underpinnings for this holding are rooted in the United States Constitution, including the Sixth and Fourteenth Amendments. See Santobello at 265 (concurrence of Douglas, J.)("Although Kercheval's dictum concerning grounds for withdrawal of guilty pleas did not expressly rest on constitutional grounds (cf. Frame v. Hudspeth, 309 U.S. 632), Walker v. Johnston, 312 U.S. 275, clearly held that a federal prisoner who had pleaded guilty despite his ignorance of and his being uninformed of his right to a lawyer was deprived of that Sixth Amendment right, or if he had been tricked by the prosecutor through misrepresentations into pleading guilty then his due process rights were offended").

Justice Douglas continued, noting that "[s]tate convictions founded on coerced or unfairly induced please have also received increased scrutiny as more fundamental rights have been applied to the States."[14] Id. at 265-66. More specifically, Justice Douglas noted "But it is also clear that a prosecutor's promise may deprive a guilty

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[14] See See Santobello at 265-66 (concurrence of Douglas, J.)("After Powell v. Alabama, 287 U.S. 45, the Court held that a state defendant was entitled to a lawyer's assistance in choosing whether to plead guilty. Williams v. Kaiser, 323 U.S. 471. In Herman v. Claudy, 350 U.S. 116, federal habeas corpus was held to lie where a lawyerless and uneducated state prisoner had pleaded guilty to numerous and complex robbery charges. And, a guilty plea obtained without the advice of counsel may not be admitted at a subsequent state prosecution. White v. Maryland, 373 U.S. 59. Thus, while plea bargaining is not per se unconstitutional, North Carolina v. Alford, 400 U.S. 25, 37-38, Shelton v. United States, 242 F.2d 101,, aff'd en banc, 246 F.2d 571 (CA5 1957), a guilty plea is rendered voidable by threatening physical harm, Waley v. Johnston, supra, threatening to use false testimony, ibid., threatening to bring additional prosecutions, Machibroda v. United States, supra, or by failing to inform a defendant of his right of counsel, Walker v. Johnston, supra. Under these circumstances it is clear that a guilty plea must be vacated")

plea of the "character of a voluntary act." Machibroda v. United States, supra, at 493. Cf. Bram v. United States, 168 U.S. 532, 542-543." Id. at 266. Further, Justice Douglas noted, "The lower courts, however, have uniformly held that a prisoner is entitled to some form of relief when he shows that the prosecutor reneged on his sentencing agreement made in connection with a plea bargain[.] . . . As one author has stated, the basis for outright vacation is "an outraged sense of fairness" when a prosecutor breaches his promise in connection with sentencing. D. Newman, Conviction: The Determination of Guilt or Innocence Without Trial 36 (1966)." Id. at 266.

In Puckett, the Fifth Circuit acknowledged that the Government had breached the plea agreement. Applying the "plain error" standard, however, the Fifth Circuit denied Puckett's request to have his plea vacated. If the Fifth Circuit had used the "de novo" test, following Santobello, once the breach was established, it would have remanded the case to the district court for resentencing or for withdrawal of the plea. Defendant Puckett respectfully requests certiorari be granted to resolve the conflict among Circuits as to what standard should be applied when a Defendant appeals a sentence based on a breach of a plea agreement, but did not raise this issue at sentencing.

II. Even if "plain error" is the correct standard of review when a defendant does not object at sentencing to the Government's breach of a plea agreement, did the Fifth Circuit err when it failed to find "plain error" was established when the breach of the plea agreement was admitted and the plea was obtained in exchange for these promises?

Even in Circuits that have adopted the "plain error" standard in situations where a Defendant does not object to a breach of the plea agreement at sentencing, there is a wide disparity as to what that standard actually means. The Puckett decision is an example of a conventional application of a Rule 52(b) "plain error" evaluation, in which the three prong test is applied. After determining the first two prongs had been met, the Puckett court held;

> Concerning the third prong, whether this error affected a substantial right, Puckett has not carried his burden of showing prejudice. . . . Puckett has made no showing that, absent the government's recommendation, the district court would have disregarded his criminal conduct and granted the reduction for acceptance of responsibility. The record indicates exactly the opposite. Absent proof of prejudice, Puckett cannot establish plain error and is not entitled to relief on a forfeited objection.

Id. at __. See also United States v. Ingraham, 238 Fed. Appx. 523, 525-526 (Unpub-11th Cir. 2007)"For an error to affect substantial rights, "in most cases it means that the error must have been prejudicial: It must have affected the outcome of the district court proceedings." United States v. Olano, 507 U.S. 725, 734, 113 S. Ct. 1770, 1778,

123 L. Ed. 2d 508 (1993). The party seeking to establish plain error has the burden of persuasion as to prejudice. See United States v. Rodriguez, 398 F.3d 1291, 1299 (11th Cir. 2005). To establish prejudice, the defendant must show a reasonable probability of a different result. *Id.")*.

Not all Circuits who apply the "plain error" standard apply it in this manner. Following Santobello, numerous decisions have held that proof a breach *is in and of itself* a showing of plain error, or at least triggers a much less onerous standard on the Defendant to show prejudice. For example, in United States v. McQueen, 108 F.3d 64, (4th Cir. 1997), the Defendant failed to object to the Government's breach of the plea agreement at sentencing, and the Fourth Circuit applied a "plain error" standard. However, the Fourth Circuit noted,

> The interpretation of plea agreements is guided by contract law, and parties to the agreement should receive the benefit of their bargain. Because a defendant's fundamental and constitutional rights are implicated when he is induced to plead guilty by reason of a plea agreement, our analysis of the plea agreement or a breach thereof is conducted with greater scrutiny than in a commercial contract. When reviewing a breached plea agreement for plain error, therefore, we must establish whether the breach was "so obvious and substantial that failure to notice and correct it affected the fairness, integrity or public reputation of the judicial proceedings."

Id. at 66 (footnoted omitted). Applying this standard, the Fourth Circuit held:

> The Government's failure to argue the terms of the oral plea agreement to the district court at the sentencing hearing constituted a breach of the plea agreement. And because violations of plea agreements on the part of the government serve not only to violate the constitutional rights of the defendant, but directly involve "the honor of the government, public confidence in the fair administration of justice, and the effective administration of justice in a federal scheme of government," we hold that the Government's breach constituted plain error.

Id. See also Teeple v. United States, 15 Fed. Appx. 323 (Unpub. 6th Cir. 2000)(Clay, C.J., dissenting)("Furthermore, such a plain error--the government's failure to honor its obligations under the plea agreement--affects the integrity of our judicial system and should be corrected. United States v. Taylor, 77 F.3d 368, 372 (11th Cir. 1996); United States v. Mondragon, 228 F.3d 978, 981 (9th Cir. 2000) ("The integrity of our judicial system requires that the government strictly comply with its obligations under a plea agreement.")); United States v. Barnes, 278 F.3d 644, 647-648 (6th Cir. 2002)("The fact that our review is guided by a plain error standard does not effect the application of Santobello, Cohen, and their progeny inasmuch as is well-settled that when a defendant pleads guilty in reliance on a plea agreement, he waives certain fundamental constitutional rights such as the right to trial by jury"); United States v. Saling, 205 F.3d 764, 766-67 (5th Cir. 2000) (summarily reversing when Government had breached plea agreement without specifying whether defendant had preserved his objection).

These cases show that Santobello requires a different "plain error" evaluation that is normally imposed under Rule 52(b). If such a "modified" plain error evaluation had been used in the instant case, the Fifth Circuit would have reversed and remanded. Defendant further requests that certiorari be granted to clarify the type of "plain error" evaluation to be used by the Circuits in cases where a defendant fails to object to the Government's breach of a plea agreement at sentencing.

Because this case presents a question implicating this Court's supervisory powers,[15] and an important question of federal law that has not been, but should be, settled by this Court, this Court should grant certiorari.

CONCLUSION

Because the Fifth Circuit violated the doctrines set forth in Santobello v. New York, 404 U.S. 257 (1971) when it applied a "plain error" standard of review to Defendant's appeal based on the government's admitted breach of the plea agreement and Defendant did not object to said breach at the time of sentencing, certiorari should be granted. In the alternative, even if "plain error" is the correct standard of review when a defendant does not object at sentencing to the Government's breach of a plea agreement, the Fifth Circuit erred when it failed to find "plain error" was

[15] See, e.g., Nguyen v. United States, 539 U.S. 69 73-74 (2003) (granting certiorari to exercise this Court's supervisory powers to review whether court of appeals in reviewing criminal cases had departed from accepted and usual course of judicial proceedings).

established when the breach of the plea agreement was admitted and the plea was obtained in exchange for clear promises, and certiorari should be granted.

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Counsel for Petitioner

No. 07-_____

IN THE SUPREME COURT OF THE UNITED STATES

JAMES BENJAMIN PUCKETT

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, pursuant to Rule 39 and 18 U.S.C. § 3006A(d)(6), asks leave to file the accompanying Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit without prepayment of costs and to proceed in forma pauperis. Petitioner was represented by counsel appointed under the Criminal Justice Act, 18 U.S.C. § 3006A(b) and (c), in the United States District Court for the

Northern District of Texas and on appeal to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this th day of ___ 2008.

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IN THE SUPREME COURT OF THE UNITED STATES

JAMES BENJAMIN PUCKETT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PROOF OF SERVICE

I, Lars Robert Isaacson, do certify that on March 3, 2008, pursuant to Supreme Court Rules 29.3 and 29.4, I have served the attached Motion for Leave to Proceed in Forma Pauperis and Petition for a Writ of Certiorari on each party to the above proceeding, or that party's counsel, and on every other person required to be served. I have served the Supreme Court of the United States via United States mail, with

first-class postage prepaid. The Solicitor General, Assistant United States Attorney Susan Cowger, and the petitioner were each served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

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OPPOSITION BRIEF

No. 07-8521

IN THE SUPREME COURT OF THE UNITED STATES

EDWARD JEROME HARBISON,

Petitioner,

v.

RICKY BELL, Warden,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

Did the court of appeals err in affirming the district court's denial of petitioner's motion to expand the appointment of the federal public defender to include representation at petitioner's state executive clemency proceedings?

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The opinion of the court of appeals (Pet. App. A) is reported at 503 F.3d 566. The relevant opinion of the district court (Pet. App. B) is unreported but may be found at 2007 WL 128954.

JURISDICTION

The judgment of the court of appeals was entered on September 27, 2007. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT

Harbison was convicted in 1983 by a Hamilton County Criminal Court jury of first-degree murder, second-degree burglary, and grand larceny. The jury sentenced him to death for the murder, and the Tennessee Supreme Court affirmed the judgment. *State v. Harbison*, 704 S.W.2d 314 (Tenn.), *cert. denied*, 476 U.S. 1153 (1986).

After unsuccessfully seeking state post-conviction relief, *See Harbison v. State*, No. 03C01-9204-CR-00125, 1996 WL 266114 (Tenn.Crim.App. May 20, 1996) (app. denied Nov. 12, 1996), Harbison filed a petition for a writ of habeas corpus in the district court in 1997. The district court, under the authority of 21 U.S.C. § 848(q)(4)(B) (recodified at 18 U.S.C. § 3599 (Mar. 9, 2006)), appointed the Federal Defender Services of Eastern Tennessee, Inc., to represent Harbison "in the preparing and filing of a petition for a writ of habeas corpus pursuant to 28 United States Code

Section 2254 and all proceedings in connection therewith." R. 5. The district court denied relief in 2001, and the court of appeals affirmed the judgment. *Harbison v. Bell*, 408 F.3d 823 (6th Cir. 2005).

In 2006, Harbison, through Federal Public Defender Services of Eastern Tennessee, Inc., filed a second "petition for writ of habeas corpus" in the district court. He alternatively requested that the district court entertain the petition as a motion for relief from the 2001 judgment under Fed.R.Civ.P. 60(b)(6). Treating the pleading as both a "second or successive habeas corpus application" under 28 U.S.C. § 2244 and a Rule 60(b)(6) motion, on November 28, 2006, the district court denied the Rule 60(b)(6) motion and transferred the successive application to the court of appeals pursuant to 28 U.S.C. § 1631 for treatment as a motion for authorization to file a second or successive habeas corpus application.

With a scheduled execution date of February 22, 2007, pending and state executive clemency proceedings apparently contemplated but not yet filed, the federal public defender who had represented Harbison in the federal habeas proceeding, filed on December 13, 2006, a motion requesting the district court to extend the appointment to include representation in Harbison's state clemency proceedings under 18 U.S.C. § 3599(e). Respondent did not oppose the motion. On January 16, 2007, the district court denied the motion. Pet. App. B at 015-019.

On February 1, 2007, the Governor of Tennessee granted an executive reprieve to Harbison until May 2, 2007, to allow the Department of Correction to review Tennessee's lethal-injection protocol. Following the expiration of the reprieve, the

Tennessee Supreme Court set a new execution date of September 26, 2007, for Harbison. In the meantime, Harbison appealed (No. 07-5059) from the district court's order denying the expansion of counsel's appointment.

On September 19, 2007, in a lawsuit brought by Harbison under 42 U.S.C. § 1983 challenging the constitutionality of Tennessee's lethal-injection protocol, the United States District Court for the Middle District of Tennessee enjoined the Department of Correction from executing Harbison under the protocol. *See Edward Jerome Harbison v. George Little, et al.*, No. 3:06-1206 (M.D. Tenn.). The case is now pending on appeal in the court of appeals, *Harbison v. Little*, No. 07-6225, and is being held in abeyance pending this Court's decision in *Baze v. Rees*, No. 07-5439.

On September 27, 2007, the court of appeals affirmed the judgment of the district court in this case, declining to extend counsel's appointment to state clemency proceedings. Pet. App. A at 003-004. The Tennessee Supreme Court has not set a new date for Harbison's execution. Harbison has no executive clemency application pending with the Governor of Tennessee.

ARGUMENT

THE COURT OF APPEALS DID NOT ERR IN AFFIRMING THE DISTRICT COURT'S DENIAL OF PETITIONER'S MOTION TO EXPAND THE APPOINTMENT OF THE FEDERAL PUBLIC DEFENDER TO INCLUDE REPRESENTATION AT PETITIONER'S STATE EXECUTIVE CLEMENCY PROCEEDINGS.

Petitioner contends that the court of appeals erred in affirming the district court's denial of his motion to expand the appointment of the Federal Defender Services of Eastern Tennessee, Inc. ("FDSET"), to include representation at state clemency proceedings. Petitioner asserts a conflict among the circuit courts of appeal as to whether 18 U.S.C. § 3599(e) permits federally funded counsel to represent a condemned inmate at state clemency proceedings and requests that review be granted in this case to resolve the conflict. Petitioner also seeks resolution of the question whether a certificate of appealability under 28 U.S.C. § 2253(c)(2) is necessary for an appeal from the district court's order denying the motion. For the reasons that follow, review of these issues is unwarranted.

Section 3599 provides, in pertinent part:

> (a)(2) In any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f).
>
> . . .

> (e) Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

Under the plain provisions of this statute, an attorney appointed in a federal habeas proceeding under 28 U.S.C. § 2254, unless replaced by similarly qualified counsel, "shall represent the defendant throughout every subsequent stage of available judicial proceedings . . . and shall also represent the defendant in such . . . proceedings for executive or other clemency as may be available to the defendant."

On February 7, 1997, the district court, pursuant to 18 U.S.C. § 3599(e) (as previously codified at 21 U.S.C. § 848(q)(4)(B)), appointed FDSET to represent petitioner "in the preparing and filing of a petition for a writ of habeas corpus pursuant to 28 United States Code Section 2254 and all proceedings in connection therewith." R. 5. Since that appointment, FDSET has continuously represented petitioner throughout all subsequent federal proceedings and has not been "replaced by similarly qualified counsel."

Because under the plain terms of § 3599 FDSET was authorized to represent petitioner in state executive clemency proceedings, counsel's motion for expansion of the initial appointment was unnecessary; the statute itself furnishes the authority for continued representation. The district court's denial of the motion and the court of

appeals' affirmance are thus correct for that reason. If counsel believes, as petitioner urges here, that § 3599 authorizes state clemency representation, counsel can undertake such representation and then request compensation from the district court for those services. If counsel is denied compensation, the matter may be appealed at that time. If the denial of compensation is based on the determination that § 3599 does not authorize continuing representation at state clemency proceedings, the issue then will be squarely presented for review.

Nor does this case present an appropriate vehicle for resolution of the question whether a certificate of appealability was necessary for an appeal of the district court's order. The court of appeals affirmed the district court's ruling without deciding the certificate-of-appealability question. Pet. App. A at 004. This Court will not review issues not passed on below. *See Illinois v. Gates*, 462 U.S. 213, 217-22 (1982).

Finally, petitioner is not currently under a scheduled date for execution, and he has no clemency application pending before the Governor of Tennessee. Thus, review by this Court of the question whether state clemency representation is permitted by § 3599 would be premature. "It has long been settled that a federal court has no authority 'to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 07-8521

IN THE SUPREME COURT OF THE UNITED STATES

EDWARD JEROME HARBISON,

Petitioner,

v.

RICKY BELL, Warden,

Respondent.

PROOF OF SERVICE

I, Gordon W. Smith, a member of the Bar of this Court representing the party on whose behalf service is made, do hereby certify that on this date, February ____, 2008, as required by Supreme Court Rule 29, I have served the enclosed Respondent's Brief in Opposition on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above document in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names, addresses, and telephone numbers of those served are as follows:

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REPLY BRIEF

No. 07-8521

In the Supreme Court of the United States
October Term, 2007

EDWARD JEROME HARBISON,
Petitioner,

v.

RICKY BELL,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT IN REPLY

Respondent's astounding opposition suggests that review be denied because the lower courts' decisions, which expressly prohibit undersigned counsel from representing Mr. Harbison during state clemency proceedings, are wrong. Respondent boldly argues this Court's intervention is unnecessary because undersigned counsel should ignore the court of appeals' wrongful ruling and advocate clemency for Mr. Harbison pursuant to the plain language of 18 U.S.C. §3599.

Mr. Harbison agrees that the court of appeals' decision was wrongly decided, as was the case upon which it relied, House v. Bell, 332 F.3d 997 (6th Cir. 2003). Denying certiorari review, however, will only perpetuate the Sixth Circuit's adherence to an erroneous rule of law and the conflict between the circuits regarding the scope of federally paid, 18 U.S.C. § 3599 counsel's representation of indigent persons under state court sentences of death. Instead, this Court should grant certiorari review and set the matter for merits briefing.

Given what is essentially Respondent's "confession of error," it is arguable that this Court could grant certiorari and summarily overrule the decision below. The Sixth Circuit, however, does not stand alone in its errant interpretation of 18 U.S.C. § 3599. Rather, it is joined by the Fifth and Eleventh Circuits. See Clark v. Johnson, 278 F.3d 459, 462 (5th Cir. 2002), and King v. Moore, 312 F.3d 1365, 1367-1368 (11th Cir. 2002). Accordingly, full review is needed to resolve the circuit split and provide uniformity in the representation of indigent criminal defendants.

Notwithstanding Respondent's concession on the question presented, his opposition contains two assertions which require correction. First, his attempt to recast the question as one of funding is disingenuous. Respondent knows full well that undersigned counsel's office is already funded for the representation of indigent capital defendants and that the statutory and regulatory framework under which it expends those funds requires permission of the federal court. The argument that this Court should forgo review until and unless undersigned counsel violate the district court's order, disregard the House decision, represent Mr. Harbison in his pursuit for clemency, apply for compensation, and are denied, is nothing short of frivolous.

Second, the suggestion that the questions presented became moot when the State of Tennessee was enjoined from executing Mr. Harbison in violation of the Eighth Amendment's prohibition against cruel and unusual punishment. Harbison v. Little, 511 F.Supp.2d 872 (M.D.Tenn. 2007), is also without any legal or factual basis whatsoever. A question does not become moot if it is capable of repetition yet evades review. Federal Election Commission v. Wisconsin Right to Life, Inc., ___ U.S. ___, 127 S.Ct. 2653, 2662 (2007). The decision below and House v. Bell, supra, remain controlling law in the Sixth Circuit. Counsel are still prohibited from petitioning Tennessee's Governor to exercise his commutation powers and spare Mr. Harbison's life.

Moreover, the presence or absence of an execution date does not affect the availability of clemency. See TENN. CONST. ART. III §6; TENN. CODE ANN. §§40-27-

101, 105. Mr. Harbison may request executive clemency at any time. The question remains as to whether he is afforded the statutory right to the assistance of counsel conferred on indigent defendants by 18 U.S.C. §3599 and as provided in the Tenth and Eighth Circuit Courts of Appeals. See Hain v. Mullin, 436 F.3d 1168, 1171 (10th Cir. 2006)(en banc), and Hill v. Lockhart, 992 F.2d 801, 803 (8th Cir. 1993).

CONCLUSION

For the foregoing reasons Petitioner respectfully requests that this Court grant the petition for a writ of certiorari and that it set this matter for briefing on the merits.

Respectfully submitted,

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REPLY BRIEF

Supreme Court, U.S.
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No. 07-8521 (Capital Case)

In the Supreme Court of the United States

EDWARD JEROME HARBISON,

Petitioner,

v.

RICKY BELL, WARDEN

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF FOR PETITIONER

The United States, appearing as *amicus curiae*, argues that Section 3599 prevents the federally-paid counsel who represented Mr. Harbison throughout proceedings under Section 2254—and as a result became fully familiar with all of the facts relevant to his case—from utilizing that knowledge to assist Mr. Harbison in seeking relief from the death penalty in the state clemency process that follows rejection of his Section 2254 application. That supposedly is true notwithstanding Section 3599(e)'s express statement that counsel appointed pursuant to Section 3599(a)(2) to represent a state defendant in a Section 2254 action "shall also represent the defendant in such * * * proceedings for executive or other clemency as may be available to the defendant."

The Solicitor General's position cannot be squared with this plain statutory language; indeed, his brief does not get around to analyzing this text until half-way through the argument. He instead relies on inferences from legislative history and on policy arguments regarding state *court* representation, an issue not implicated by the clemency clause of Section 3599(e) that is the subject of this case. This Court should reject the Solicitor General's invitation to rewrite Congress's language and instead interpret the statute in accordance with its plain meaning.

A. Subsection (e)'s Unambiguous Reference To "Proceedings For * * * Clemency As May Be Available To The Defendant" Is Dispositive Of The Issue In This Case.

Recognizing that Section 3599(e)'s express statement requiring representation of defendants in clemency proceedings presents a high barrier to his ar-

gument, the Solicitor General asserts that other subsections of Section 3599—as well as other language in subsection (e)—provide important "context" that somehow overrides the explicit statutory obligation to represent death row defendants in clemency proceedings. These arguments are unavailing: subsection (e) means what it says and requires federally-paid counsel appointed under Section 3599(a)(2) to represent a state defendant in a Section 2254 action also to represent that defendant in subsequent state clemency proceedings.

1. Section 3599(a)(2) makes clear that subsection (e) delineates the legal services that federally-paid counsel "shall" provide to state defendants.

Despite his repeated references to "context," the Solicitor General ignores the most important statutory context for construing subsection (e): subsections (a)(1) and (a)(2), which determine who is entitled to counsel. Subsection (a)(1) states in pertinent part:

> in every criminal action in which a defendant is charged with a crime which may be punishable by death, a defendant who is or becomes financially unable to obtain adequate representation * * * shall be entitled to the appointment of one or more attorneys * * *.

Subsection (a)(2) provides:

> In any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, * * * any defendant who is or becomes financially unable to obtain adequate representation * * * shall be entitled to the appointment of one or more attorneys * * *.

Subsections (a)(1) and (a)(2) thus create two classes of defendants who are entitled to counsel, with (a)(2) granting counsel in postconviction proceedings to indigent, otherwise unrepresented state and federal capital defendants (Section 2254 and Section 2255 defendants, respectively). Accord U.S. Am. Br. 14 ("Section 3599(a) makes two different groups of indigents eligible for federal funding").

Subsection (a)(2) further states that defendants eligible for counsel under that provision are "entitled to the appointment of one or more attorneys and the furnishing of such other services *in accordance with subsections (b) through (f)*" (emphasis added). It accordingly makes clear that subsection (e) is the statutory provision defining the range of "services" to which a state-sentenced defendant is entitled from the counsel appointed to represent him in his capital Section 2254 proceeding.

2. *There is no basis for modifying the text of subsection (e) to limit the representation obligation to "federal" fora.*

The Solicitor General does not seriously contend that federally-appointed counsel's representation of Mr. Harbison in Tennessee's clemency proceedings falls outside the plain language of the clemency clause of subsection (e). Nor could he.

The provision states that an attorney appointed to represent a defendant in a Section 2254 proceeding "shall also represent the defendant in such * * * proceedings for executive or other clemency as may be available to the defendant." 18 U.S.C. § 3599(e). The Tennessee clemency proceeding plainly involves

"clemency" and is "available to" Mr. Harbison. That is all the statutory language requires.[1]

Even though Section 3599(e) contains no language restricting the representation obligation to "federal" fora, the Solicitor General asserts that such a limitation should be read into the statute. That plea for a judicial revision of Congress's language should be rejected by this Court.

First, the Solicitor General points (Br. 15-16) to the absence of the word "federal" from Section 3599(a)(1), the provision requiring appointment of counsel in federal criminal proceedings in which the defendant is subject to the death penalty. Because that provision should be construed to apply only to federal cases notwithstanding the absence of an express limitation, the argument goes, subsection (e) should be construed in the same manner even though it is not expressly limited to "federal" proceedings. The flaw in this reasoning is that the two provisions are not analogous.

Section 3599 is contained in title 18, which principally addresses federal criminal proceedings. Unless the context indicates otherwise, therefore, it is logical to read a provision to relate only to defendants in federal proceedings. Section 3599(a)(1)—

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[1] As discussed below (at pages 11-13), we agree with the Solicitor General (Br. 13) that "some of the services listed in Subsection (e) apply only to federal defendants." But that is not true of representation in clemency proceedings because—as discussed in the text—the clemency clause contains no language limiting its applicability to federal defendants; indeed, the statutory reference to "executive or other" clemency proceedings makes clear that state clemency proceedings are encompassed within the provision. Pet. Br. 23-24; see pages 6-7, *infra*.

which falls at the beginning of the provision and applies to "every criminal action in which a defendant is charged with a crime which may be punishable by death"—contains no language providing grounds for an exception to this general approach.

That is not true of Section 3599(e), which applies to appointments of counsel under *both* subsection (a)(1) *and* under subsection (a)(2). The latter provision requires appointment of counsel for "any defendant" in "any post conviction proceeding under section 2254"—a category made up almost exclusively of defendants sentenced under state law—and expressly references "subsections (b) through (f)" to define the services to be provided to the defendant. Because the statutory text thus makes clear that subsection (e), unlike subsection (a)(1), applies to defendants convicted under state law as well as those subject to proceedings under federal law, the phrase "proceedings for executive or other clemency as may be available to the defendant" in subsection (e) necessarily must be read to encompass clemency proceedings available to both categories of defendants for whom counsel is appointed under subsection (a), whether sentenced under state or federal law.

Indeed, if Congress intended the services listed in subsection (e) to apply only to federal capital defendants in federal "forums," as urged by the government, then Congress would have said so by indicating in subsection (a)(2) that counsel is appointed to defend Section 2254 defendants "in accordance with" only subsections (c), (d), (f) and (g); or by including in subsection (a)(2) a restriction on the services available to defendants in Section 2254 proceedings. It did not. Rather, Congress specifically

provided Section 2254 defendants the services described in subsection (e).

That being the case, the reference to subsection (e) in Section 3599(a)(2) and the inclusion of Section 2254 defendants in subsection (a)(2) cannot be ignored and the government's "contextual" argument is actually a significant—and wholly unjustified—revision of the plain language.

Second, as we explained in our opening brief (Pet. Br. 23-24), the text of the clemency clause confirms its applicability to state defendants by the reference to "proceedings for executive *or other* clemency" (emphasis added), making clear that the clause extends beyond the federal system, which provides only for grants of clemency by the President.

The Solicitor General strains to argue (Br. 25) that "or other" was included to encompass "proceedings before other persons whom [the Executive] may enlist to help review clemency applications." But any such ancillary advice plainly would be part of the "proceeding[] for executive * * * clemency" because the ultimate decision still rests with the President.

The Solicitor General also contends (Br. 27) that "clemency in capital cases is in fact an executive function throughout the Nation" and the "or other" phrase therefore is not indicative of congressional intent to encompass state clemency proceedings. In fact, a number of States employ processes quite different from the federal government. Thus, in Georgia clemency decisions are made by a board whose members—while appointed by the governor—cannot be removed by him except for cause. Ga. Const. Art. IV, § 2; Ga. Code § 42-9-14. Other States utilize a similar

approach. See Governor/Former Governor Am. Br. 4-5.

In New Hampshire, the governor's decisions must be ratified by an elected council. Governor/Former Governor Am. Br. 4-5 n.3. In other States, the courts are part of the process and in still others the legislatures have reserved certain pardon authority to themselves. See *id.* at 4-5; U.S. Am. Br. 26-27.

These systems plainly differ fundamentally from one in which the final decision is made by the chief executive alone, with or without input from an advisory board. It therefore is logical to conclude that Congress added the phrase "or other" to ensure that the right to counsel encompassed all of the various clemency processes employed by the States. There is no other reasonable explanation for inclusion of the phrase.[2]

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[2] The Solicitor General engages in close analysis of the various approaches employed by the States (see U.S. Am. Br. 26-27) in an effort to establish that all are "executive" because they are in some way linked to executive authority. Given Congress's perspective, however, it is likely that it employed the word "executive" to capture systems, like the federal government's, in which the ultimate decision is made by the chief executive; and used the phrase "or other" to include all other approaches. It seems unlikely that Congress would have engaged in a detailed analysis of each State's system—and the particular offenses subject to the death penalty in that State—to determine whether the clemency system was "executive" in the separation-of-powers sense that it ultimately rested on executive authority alone. And even if it did, because in some States, such as Georgia, the clemency authority is exercised by what is the equivalent of an independent agency in the federal system, it would have concluded that the term "executive" alone would not have been sufficient to encompass all of the various state mechanisms.

3. *Subsection (e)'s reference to "available" clemency proceedings is unambiguous and does not mean "only federal" proceedings.*

The Solicitor General next contends (Br. 15) that the word "available" in subsection (e)'s clemency clause actually means "federal." That contention is inconsistent with both common sense and basic linguistic principles.

The government first appears to suggest (Br. 13 n.2) that because a very small subset of Section 2254 petitioners may be eligible for clemency from the President (prisoners in U.S. territories), "available" should be read to mean only "federal" clemency proceedings.

As a threshold matter, even if Presidential clemency were available for this very discrete set of defendants, it still is not the clemency process "available to" the overwhelming majority of defendants who invoke Section 2254—defendants convicted under state law. And the government's argument therefore provides no basis for interpreting subsection (e) to deny representation in the clemency proceedings that *are* available to such defendants, clemency proceedings under state law.

But the government's argument also is flawed even on its own terms. As the Solicitor General concedes (Br. 13-14 n.2), Section 2254 defendants challenging territorial convictions cannot be included within those persons entitled to counsel under subsection (a)(2), which requires a death sentence, because there are no capital offenses under the law of any of the territories. Moreover, the federal regulation indicating that persons convicted of territorial

crimes should submit clemency petitions to the appropriate territorial official—not to the President—existed for five years before Congress enacted the predecessor to Section 3599. See 28 C.F.R. 1.4 (1983).

In the hypothetical event that a territory sentenced one of its prisoners to death, and that prisoner sought federal habeas relief under Section 2254 and sought federally appointed counsel under Section 3599(a)(2), Congress would have known that the territorial prisoner would *not* seek "federal" clemency from the President. Accordingly, the class of Section 2254 defendants that the government claims can invoke Presidential clemency in fact does not exist.

Moreover, substituting the word "federal" for the word "available" in the clemency clause of subsection (e), would result in a nonsensical reading of the provision: "and shall also represent the defendant in such * * * proceedings for executive or other clemency as may be [federal] to the defendant." A reorganization of that clause's structure to limit section (e) clemency proceedings to "federal" clemency is incompatible with subsection (a)(2) because federal clemency is not available to Section 2254 capital defendants.

The position urged by the Solicitor General excludes virtually all Section 2254 defendants from those defendants referred to in subsection (e) to whom clemency may be available. This strained and illogical revision of the statute is not supported by its plain language, especially when Congress could have explicitly limited representation for clemency proceedings "as may be available to the [subsection (a)(1) and/or Section 2255] defendant." Congress did not do so. This Court should decline the suggestion

that the word "federal" be forced into the clemency clause where it neither logically fits nor is even implied by the statute's plain language.

4. *Giving effect to the plain language of subsection (e)'s clemency clause will not trigger the Solicitor General's parade of horribles relating to state court litigation.*

Most of the Solicitor General's argument (*e.g.*, Br. 14-20) focuses on the portion of subsection (e) providing that an appointed attorney "shall represent the defendant throughout every subsequent stage of available judicial proceedings" and then specifying the various types of proceedings in which representation must be provided. See Pet. Br. 20-21. He contends that if the clemency clause is interpreted to encompass state clemency proceedings, then counsel appointed in Section 2254 proceedings necessarily will be permitted to represent state defendants in state postconviction proceedings and other proceedings in state court.

As a threshold matter, the clemency issue before the Court in this case turns on the meaning of the clemency clause of Section 3599(e), not on the separate portion of that subsection relating to "judicial proceedings." There simply is no occasion for the Court to address the meaning of the latter clause in this case.[3]

Moreover, the government is simply wrong in asserting that a holding by the Court that the clemency

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[3] That is especially true because the clemency clause contains the "or other" language, which clearly encompasses non-federal clemency processes. See pages 6-7, *supra*.

clause encompasses state clemency proceedings will somehow open the door to broad representation by federally-paid counsel in state courts. The portion of subsection (e) relating to judicial proceedings states:

> each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures.

Subsection (e) thus sets out the "ordinary sequence of events" for capital defendants who come before the federal courts. See U.S. Am. Br. 15 ("the way the term [motions for new trial] appears in context – between 'sentencing' and 'appeal' – shows that it refers to motions for new trial filed in the ordinary sequence of events, *i.e.*, before direct appellate review"); Pet. Br. 20-21.

The first group of events occurs in the course of trial and direct review: "pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States." 18 U.S.C. § 3599(e). The second group of events occurs on collateral review: "post-conviction process, together with stays of execution and other appropriate motions and procedures." *Ibid.*

This text—divided according to the "ordinary sequence of events" in a capital case—thus makes clear that the availability of representation by appointed counsel in a particular proceeding listed in

subsection (e) depends upon whether the attorney is appointed under subsection (a)(1) (to represent a federal defendant at trial) or under subsection (a)(2) (to represent a state or federal defendant in postconviction proceedings).

The list of services to be performed by counsel appointed pursuant to Section 3599(a)(2) is shorter than counsel's duties when appointed under subsection (a)(1) because (a)(2) defendants are litigating in the final tier of the post-trial review process. Given the two different groups of defendants created by subsections (a)(1) and (a)(2), it is natural that, as the Solicitor General observes (Br. 14), "not every listed service applies to both categories of indigent clients." See also Pet. Br. 20-21 (the roster of stages for which representation is provided begins for a Section 2254 defendant with "all available post-conviction process" and ends with "executive or other clemency as may be available to the defendant").

Holding that the separate clemency clause encompasses state clemency proceedings thus will have no impact whatever on the extent to which federally-paid counsel will litigate in state court, because that separate question does *not* turn upon the presence or absence of the word "federal" as the Solicitor General contends. The division of services with respect to the category of defendant—(a)(1) or (a)(2)—is accomplished by a plain and logically sequential reading of the statute.[4]

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[4] The government's other contextual argument, relying upon subsections (b) and (c) of the statute, also does little to advance its cause. The fact that Congress chose to set minimum qualifications for those attorneys who are appointed under Section 3599 (U.S. Am. Br. 16), in no way usurps a State's right to set

The fact that subsection (e) does not expressly delineate this division of services (U.S. Am. Br. 14) is irrelevant, because the necessary delineation is accomplished by the provision's logical recitation of litigation steps. The Solicitor General is therefore wrong in asserting (U.S. Am. Br. 18) that following Congress's express language regarding representation in clemency would open the gates to a flood of federally-funded state court litigation.[5]

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its own qualifications for attorneys assisting clients as they seek clemency from its governor. Counsel appointed under Section 3599 and the Criminal Justice Act, 18 U.S.C. § 3006A, must meet the qualifications contained in Section 3599(b) or (c) and the minimum qualification of being "learned in the law applicable to capital cases." 18 U.S.C. § 3005. However, these requirements are not always exclusive and do not always apply only to federal court. "[F]ederal courts may add requirements" to a Federal District's assigned counsel plan. *Russell* v. *Hug*, 275 F.3d 812, 817-818 (9th Cir. 2002). Indeed, some CJA plans require bar membership in the State in which the District is located. *Id.* at 815, 818.

Moreover, it is possible that an attorney appointed to represent a defendant during the trial phase of a case may not be a member of the bar of the relevant court of appeals or of this Court. In those circumstances, another attorney may be appointed to represent the defendant in such proceedings. The same is true in the unlikely circumstance that an attorney appointed to represent a defendant in a Section 2254 proceeding was not a member of the bar of the State under whose law the defendant was convicted.

[5] Certainly the Solicitor General has not shown that those jurisdictions currently abiding by the twenty-year-old statute's plain language and allowing counsel to continue to represent their clients in state clemency proceedings have experienced such a phenomenon. They haven't. The specter of abusive litigation tactics, raised in other return-to-state-court contexts, has not carried the day nor have such dire predictions materialized. See, *e.g. Rhines* v. *Weber*, 544 U.S. 269, 277-278 (2005); *Slack* v. *McDaniel*, 529 U.S. 473, 489 (2000).

To the contrary, interpreting Section 3599 in accordance with its plain language results in an efficient continuity of resources when, at the end of the federal habeas process, the unsuccessful and otherwise unrepresented capital defendant seeks clemency. The plain language of Section 3599 requires appointed counsel only when a defendant is "unable to obtain adequate representation" and Mr. Harbison does not argue otherwise.

In fact, Mr. Harbison asked the Tennessee Supreme Court to appoint clemency counsel to represent him, but the request was denied. Pet. Br. Add. 27a. Mr. Harbison's simple assertion that the statute be enforced according to its plain terms does not encroach on a State's prerogative to provide counsel to perform any relevant services listed under Section 3599(e). If a State does so, the statute's own provisions disallow the appointment of counsel.

In sum, there simply is no need to depart from the statute's plain language and re-write it to insert the word "federal" throughout subsection (e).

5. *Congress did not ratify the Solicitor General's interpretation of the statute.*

We explained in our opening brief (at 29-31) that the government's ratification argument must be rejected because there was no settled judicial view regarding the issue in this case when Congress reenacted Section 3599 in 2006.

The Solicitor General reprises (Br. 28-30) his contention that the conclusion in *Hill* v. *Lockhart*, 992 F.2d 801 (8th Cir. 1993), that appointed attorneys were obliged to represent defendants in state clemency proceedings "was dictum" and therefore did

not undercut the supposed judicial consensus. But the explanation supporting that conclusion takes nearly two full pages in the government's brief (see U.S. Am. Br. 28-30), and the government is forced to acknowledge that "some district courts in the Eighth Circuit have continued to approve funding for state clemency counsel based on *Hill*." U.S. Am. Br. 30; see also *Hain* v. *Mullin*, 436 F.3d 1168, 1172 (10th Cir. 2006) (construing *Hill* to determine that state clemency proceedings are encompassed within the federal statute); Pet. Br. 30 n.26. In these circumstances, it simply is not credible to assert that Congress would have ignored *Hill* and found a judicial consensus regarding the proper interpretation of the statute with respect to this issue.

That is especially true because of the significant number of district court decisions in other circuits rejecting the interpretation advanced by the government. Pet. Br. 30-31. Citing *Herman & MacLean* v. *Huddleston*, 459 U.S. 375 (1983), the Solicitor General asserts (Br. 28-29 n.11) that district court decisions should be ignored in determining the existence of a judicial consensus. Of the two contrary district court decisions in *Huddleston*, however, one had been rendered a nullity by a subsequent decision of the court of appeals encompassing the district and the second "stood alone at the time of the [congressional action] * * *, and even that decision had not been followed in the district in which it was decided, or elsewhere within the same Circuit." 459 U.S. at 385 n.21 (citations omitted). It was the fact that the two district court decisions had been undermined that permitted the Court to disregard them.

That is not the case here—the district court decisions cited in our opening brief have not been un-

dermined. Indeed, because the district courts are the primary appointing authority, applying Section 3599 in every capital case involving an indigent defendant, their prevailing interpretation carries significant weight.

For these reasons, there is no basis for finding a judicial consensus when Congress reenacted the statute in 2006. See also *F. Hoffmann-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 171-173 (2004) (concluding that three district court decisions all agreed with respect to the particular legal proposition before determining Congress's understanding of the state of the law at the time it enacted the statute before the Court).[6]

B. Section 3599's Legislative History Provides No Basis For Ignoring The Plain Meaning Of The Statutory Language.

Resorting to legislative history in interpreting statutory language is always perilous, and when the statute is clear and unambiguous—as here—improper. See Pet. Br. 27. The risks of this enterprise are particularly great here, where the Solicitor General attempts (Br. 20-23) to draw speculative conclusions from the legislative process while ignoring significant features of the legislative history of Section 3599.

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[6] The government's citation (Br. 29 n.11) of *Pierce* v. *Underwood*, 487 U.S. 552, 567 (1988), is mystifying. That case did not involve a claim of congressional ratification; to the contrary, the Court stated that "[t]his is *not* * * * a situation in which Congress reenacted a statute that had in fact been given a consistent judicial interpretation along the lines that the quoted Committee Report suggested." *Ibid.* (emphasis added).

The Solicitor General asserts that the legislative history "demonstrates that the list of services set out in Subsection (e) was written to apply to federal defendants at trial and on direct review." U.S. Am. Br. 23; see also *id.* at 21 ("Subsection (e) was not written to apply to state habeas petitioners; they were added to the eligible class just a few hours before the bill passed * * *").

The text of subsection (e) disproves this assertion because it clearly requires representation *after* trial and direct review. See pages 11-12, *supra*. And the legislative history also reveals that subsection (e), at its inception, was written by Representative Conyers to provide representation for individuals in addition to federal defendants at trial and on direct review.

By the time subsection (e) was proposed, the House of Representatives had previously debated and adopted an amendment by Representative Gekas providing appointed counsel for defendants in Section 2254 and Section 2255 proceedings.[7] Although the Gekas amendment was replaced by the subsequent Conyers amendment that included subsection (e), its purpose and effect were preserved: the Conyers amendment also contemplated counsel for Section 2254 defendants. Representative Conyers explained "the importance of this provision to provide adequate representation to persons on death row. While State courts appoint lawyers for indigent defendants, there is no legal representative automatically provided once the case is appealed to the

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[7] 134 Cong. Rec. H7281 (Sept. 8, 1988). The Gekas amendment did not specifically provide for counsel before judgment or on direct appeal.

Federal level." 134 Cong. Rec. H7259-02, 1988 WL 175612, at 96-97 (Sept. 8, 1988).

Representative Conyers further stated: "[w]hat has been happening is that it is becoming increasingly difficult to identify counsel throughout the country willing and able to accept the appointment in a growing number of capital cases for which representation is required." 134 Cong. Rec. H7259-02, 1988 WL 175612, at 96-97. In 1988, when this bill was debated and enacted, there were no prisoners on federal death row. Representative Conyers therefore could only be referring to Section 2254 cases.[8] Of course, the need for Section 2255 counsel was anticipated, and addressed in the provision that became Section 3599, because Congress was creating a new death-eligible federal crime within the same bill.

During the legislative bargaining process that resulted in the predecessor to Section 3599, the language contained in the Gekas amendment was restored (with the additional text granting services in accordance with subsections (b) through (f)), and

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[8] Elizabeth B. Bazan, *Capital Punishment: An Overview of Federal Death Penalty Statutes*, RL30962, CRS-3 & n.2 (Library of Congress updated Jan. 5, 2005), at http://www.fas.org/sgp/crs/RL30962.pdf (discussing the constitutional status of federal death penalty laws prior to the enactment of the Anti-Drug Abuse Act of 1988); *The Federal Death Penalty System: A Statistical Survey (1988-2000)*, pp.1 & 37 n.30 (U.S. Dep't of Justice Sept. 12, 2002), at http://www.usdoj.gov/dag/pubdoc/_dp_survey_final.pdf (after *Furman* v. *Georgia*, 408 U.S. 238 (1972) (per curiam), declared death penalty statutes unconstitutional, the federal death penalty was re-introduced in 1988); Death Penalty Information Center, at http://www.deathpenaltyinfo.org/federal-death-penalty (indicating that after reinstatement of the federal death penalty the first federal death sentence was in 1991).

eventually became subsection (a)(2).[9] Far from a last-minute change never carefully considered before passage, the addition of subsection (a)(2) contained the entirety of the Gekas amendment that had been previously debated and adopted. Its inclusion in the final bill clarified that the Conyers Amendment provided a statutory right to counsel to state and federal death row inmates once they sought federal habeas review.

The inclusion of subsection (a)(2) in Section 3599 thus can be described as the result of a decision by Congress that once a death sentence is imposed and a defendant enters federal habeas review, then state and federal defendants should receive the same legal services. Alternatively, it may be possible to speculate about other reasons that might underlie the deletion and subsequent resurrection of the Gekas amendment. That is the nature of the legislative process. See *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 461-462 (2002) (courts risk disturbing congressional compromise when, in the name of abstract purpose, they deviate from clear statutory text that emerges from the legislative process). That is also the reason why resorting to Section 3599's legislative history cannot aid the government's effort to rewrite the plain language of the statute.

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[9] Acknowledging the Gekas amendment as the source of the final changes adopted by the House of Representatives prior to passage removes the need to "presume" (U.S. Am. Br. 23) why the word "defendant[s]" was used to describe petitioners under Sections 2254 and 2255. That was the term used by Representative Gekas. See 134 Cong. Rec. H7281.

C. The Solicitor General's Policy Arguments Should Be Addressed To Congress; They Cannot Override Section 3599's Plain Language.

The Solicitor General finally contends (Br. 30-33) that providing representation by federally-paid counsel in state clemency proceedings is bad policy. The amicus briefs filed in support of petitioner point out the important policy concerns that *support* providing such representation for defendants facing the death penalty. The balancing of these concerns is a matter for Congress, not for this Court. Certainly the government's arguments provide no grounds for disregarding the clear language that Congress used when it wrote the statute.

First, although the Solicitor General invokes (Br. 31) "federalism concerns," the State of Tennessee expressly disavows any "real stake in whether an inmate receives federal funding for clemency counsel." Resp. Br. 7. In addition, one sitting Governor and ten former Governors from States authorizing the death penalty have expressed to this Court their view that "when funding for counsel is not otherwise available, federal funding of clemency counsel * * * serves as an essential backstop, ensuring that Governors can obtain the information they need to make fully informed clemency decisions." Governor/Former Governor Am. Br. 2-3. No States have filed briefs supporting the Solicitor General's position.

The Solicitor General's unsupported speculation—which in any event rests principally on his erroneous view that the decision in this case will result in representation by federally-paid counsel in large numbers of state judicial proceedings (see pages 10-

14, *supra*)—provides no justification for ignoring the statute's plain language.

Second, the Solicitor General expresses (Br. 31) concern about cost, although he makes no attempt to quantify the amount. Federally-paid counsel would be available only in States that do not provide indigent death row defendants with counsel for clemency proceedings. See Pet. Br. 25 n.24. And even in those situations, much if not all of the background work regarding the defendant's case will have been performed in connection with the representation in the Section 2254 proceeding. Finally, the lower federal courts "have a long experience under the Criminal Justice Act with individualized attorneys' fees decisions" (*Simmons* v. *Lockhart*, 931 F.2d 1226, 1233 (8th Cir. 1991)), and can continue to ensure the wise expenditure of such monies.[10]

Moreover, Congress has in related contexts indicated its willingness to expend federal funds to increase the accuracy of the States' administration of the death penalty. See U.S. Am. Br. 20 & 8a-11a (discussing federal grant program to assist States in establishing a state defense system that appoints, trains and monitors attorneys who represent indigent capital defendants and ensures "funding for the cost of competent legal representation by the defense team and outside experts selected by counsel." Innocence Protection Act of 2004, Pub. L. No. 108-405, § 421(e)(2)(F), 118 Stat. 2286-2288 (codified at 42 U.S.C. §§ 14163-14163a)).

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[10] Here, of course, the issue does not involve incremental funding, but, instead, permission for Federal Defender Services to represent Mr. Harbison in clemency proceedings.

The real question is not whether federal funding somehow raises federalism concerns but whether the plain text of Section 3599(e), providing representation by appointed counsel in clemency proceedings "as may be available to the defendant," applies to Section 2254 defendants entitled to counsel under Section 3599(a)(2). The answer to that question is "yes."

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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PETITIONER'S BRIEF

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No. 07-8521 (Capital Case)

In the Supreme Court of the United States

EDWARD JEROME HARBISON,

Petitioner,

v.

RICKY BELL, WARDEN

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether a certificate of appealability issued pursuant to 28 U.S.C. § 2253(c) is required to enable a court of appeals to consider the appeal of an order denying a request for federally appointed clemency counsel under 18 U.S.C. § 3599.

2. Whether counsel appointed pursuant to Section 3599 to represent a defendant sentenced to death under state law in post-conviction proceedings under 28 U.S.C. § 2254 also may represent the defendant in subsequent state clemency proceedings when the defendant is otherwise unrepresented.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Add. 5a-14a;[1] Pet. App. A) is reported at 503 F.3d 566. The opinion of the district court (Add. 15a-31a; Pet. App. B) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 27, 2007 (Add. 5a; Pet. App. A). The petition for a writ of certiorari was filed on December 21, 2007, and was granted on June 23, 2008. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Subsections (a)(2) and (e) of 18 U.S.C. § 3599 provide:

> (2) In any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f).
>
> * * * *

[1] Because the certiorari petition was filed *in forma pauperis*—and not in printed form—we have reproduced the opinions below in the addendum to this brief for the Court's convenience.

> (e) Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for *writ of certiorari* to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

The full text of Section 3599 and the text of 28 U.S.C. § 2253 are reproduced on pages 1a-4a of the addendum to this brief.

STATEMENT

The governing text in this statutory interpretation case is 18 U.S.C. § 3599(e). That section explicitly directs that counsel appointed under Section 3599(a)(2) to represent a state defendant in proceedings challenging a death sentence under 28 U.S.C. § 2254 "shall also represent the defendant in such * * * proceedings for executive or other clemency as may be available to the defendant." It is indisputable that state clemency proceedings fall within the plain language of this text; they are "executive or other clemency" proceedings that are "available to" defendants sentenced to death whose counsel are appointed in Section 2254 proceedings.

The Court must "start, as always, with the language of the statute." *Williams* v. *Taylor*, 529 U.S. 420, 431 (2000). This case ends with the language as well, because when, as here, "the statute's language is plain, 'the sole function of the courts' "—at least absent an absurd result—"'is to enforce [the statute] according to its terms.'" *Hartford Underwriters Insurance Co.* v. *Union Planters Bank*, 530 U.S. 1, 6 (2000) (internal quotation marks omitted).

A. Section 3599

Congress in 1988 provided for "quality legal representation" in capital cases because of "'the seriousness of the possible penalty and * * * the unique and complex nature of the litigation.'" *McFarland* v. *Scott*, 512 U.S. 849, 855 (1994) (quoting 21 U.S.C. § 848(q)(7) (now codified at 18 U.S.C. § 3599(d)). The Anti-Drug Abuse Act of 1988 authorized federal courts to appoint counsel for unrepresented indigent defendants in death-penalty-related proceedings. See Pub. L. No. 100-690, § 7001(b), 102 Stat. 4393-94 (codified at 21 U.S.C. § 848(q)). In 2006, this provision was repealed, reenacted without change, and codified as 18 U.S.C. § 3599. See Terrorist Death Penalty Enhancement Act of 2005, Pub. L. No. 109-177, Tit. II, § 222, 120 Stat. 230, 231.

Section 3599 is titled "Counsel for financially unable defendants." Subsection 3599(a)(2) governs the situation presented here—the appointment of counsel for an indigent, otherwise unrepresented defendant who is seeking through federal habeas corpus proceedings to vacate or set aside a death sentence imposed by a state court.[2] It states that, "[i]n any

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[2] 18 U.S.C. § 3599(a)(1) provides for the appointment of counsel to represent persons charged with a federal capital crime. Sub-

post conviction proceeding under section 2254 * * * of title 28"—a provision which applies only to state-court convictions—"any defendant who is challenging a death sentence and who is or becomes financially unable to obtain adequate representation or * * * other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f)." Thus, when four conditions are satisfied—the defendant is proceeding under Section 2254, the defendant is seeking to invalidate a sentence of death imposed by a state court, the defendant is indigent, and the defendant is otherwise unrepresented—the defendant "shall be entitled to" federally appointed counsel.

Subsections (b) through (d) concern the quality and number of appointed counsel. Subsections (b) and (c) establish qualifications for appointment before and after judgment, respectively; subsection (d) authorizes appointment of a second attorney in complex or otherwise difficult cases.

Subsection (e) addresses the scope of appointed counsel's representation and is the provision that answers the question presented in this case. Section 3599(e) first provides that, "[u]nless replaced by similarly qualified counsel," appointed counsel "shall represent the defendant throughout every subsequent stage of available judicial proceedings." Second, it specifies—with particular pertinency to attorneys who are appointed under Section 3599(a)(2) to represent a state or federal defendant in a post-

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section (a)(2) expressly and separately provides for the appointment of counsel in capital post conviction proceedings brought *either* by federal convicts (under 28 U.S.C. § 2255) *or* by state convicts (under 28 U.S.C. § 2254).

conviction proceeding "seeking to vacate or set aside a death sentence"—that these proceedings include "all available post-conviction process." Third, subsection (e) adds that, "together with" such post-conviction process, the responsibilities of appointed counsel include representing the defendant on "applications for stays of execution and other appropriate motions and procedures."

Fourth, subsection (e) directs that appointed counsel "shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant."

B. Mr. Harbison's Proceedings And Background

1. In March 1983, the Hamilton County, Tennessee grand jury indicted Mr. Harbison on two counts of first-degree murder—one count charging premeditated murder and the other count charging felony-murder—as well as counts of second degree burglary and larceny, in connection with the homicide of 62-year-old Edith Russell on January 15, 1983. The guilt and the penalty phases of the case were tried to a jury in the Hamilton County Criminal Court from November 30 through December 2, 1983.

The evidence presented at trial was that Mr. Harbison and David Schreane were in the process of burglarizing the Russell house when they were surprised by Ms. Russell's return home. Mr. Harbison stated that Ms. Russell reached for what he incorrectly believed to be a gun. He grabbed a marble vase weighing approximately twenty-five pounds and struck her in the head. The medical examiner testified that Ms. Russell suffered massive skull fractures

which were consistent with being struck with the vase at least three times. *State* v. *Harbison,* 704 S.W.2d 314, 316 (Tenn. 1986). Mr. Harbison recanted his confession during trial, stating that it had been coerced by police threats to arrest his girlfriend and take her children away, and professed his innocence. *Id.* at 317. The jury returned a verdict of guilty. *Ibid.*

The evidence presented at the penalty phase consisted of 47 lines of testimony from Mr. Harbison's mother. Trial counsel argued that Mr. Harbison lacked a significant history of prior criminal activity, that he brought no weapon to the Russell house, that he believed Ms. Russell was going for a gun, and that Ms. Russell's death was instantaneous. The jury found one aggravating circumstance—that the murder was committed during a burglary—and found that this aggravating factor outweighed the mitigation. 704 S.W.2d at 320. Mr. Harbison was sentenced to death.

The Tennessee Supreme Court upheld Mr. Harbison's conviction and sentence. *Harbison*, 704 S.W.2d at 320.

Mr. Harbison next unsuccessfully pursued relief in post-conviction proceedings in the Tennessee courts. *Harbison* v. *State,* No. 03C01-9204-CR-00125, 1996 Tenn. Crim. App. LEXIS 307 (May 20, 1996).

2. In February 1997, the United States District Court for the Eastern District of Tennessee, acting pursuant to the predecessor of Section 3599, appointed Federal Defender Services of Eastern Ten-

nessee, Inc.[3] to represent Mr. Harbison in "the preparing and filing of a petition for a writ of habeas corpus pursuant to 28 United States Code Section 2254 and all proceedings in connection therewith." R.5.[4]

Mr. Harbison's habeas corpus petition included claims previously raised and rejected by the state courts, as well as two new claims—that the State had violated the due process rule of *Brady v. Maryland*, 373 U.S. 83 (1963), and that direct appeal counsel had a conflict of interest—drawn from police records obtained by Mr. Harbison after his federal proceedings had begun. The district court denied relief, finding, *inter alia*, that Mr. Harbison's ineffective-assistance-of-counsel claims were barred for the reasons expressed by the state courts (R.118, at 30-38), and that the *Brady* and conflict-of-interest claims were barred because their factual bases could have been, but were not, discovered while the state post-conviction proceedings were pending. R.118, at 15-21 & 39-40.

A panel of the United States Court of Appeals for the Sixth Circuit affirmed the district court's grant of summary judgment for the State and dismissal of Mr. Harbison's habeas petition, with one judge dissenting on the ground that Mr. Harbison was entitled to relief on his *Brady* claim. *Harbison* v. *Bell*, 408 F.3d 823 (6th Cir. 2005). This Court denied *certiorari*. *Harbison* v. *Bell*, 547 U.S. 1101 (2006).

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[3] Federal Defender Services of Eastern Tennesse, Inc. ("FDSET") is a non-profit organization established pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A(g)(2)(B).

[4] Record cites (R.__) reference U.S. District Court Eastern District of Tennessee Docket No.1:97-cv-52.

3. On June 13, 2006, the State of Tennessee moved its Supreme Court to schedule Mr. Harbison's execution. Mr. Harbison responded and asked that, if his execution was scheduled, the court appoint counsel to represent him in seeking clemency before the Tennessee Board of Probation and Parole and the Governor as well as in any other available proceedings.

On July 17, 2006, the Tennessee Supreme Court ordered Mr. Harbison to be executed October 11, 2006. The State's Post-Conviction Defender Office was appointed to represent Mr. Harbison. R.156-3.

The Post-Conviction Defender filed a motion to withdraw, citing a lack of time and resources to prepare adequately an application for clemency. R.156-4. The state court denied the withdrawal motion but reset the execution date to February 22, 2007, to "afford sufficient time for adequate representation." R.156-5.

Subsequently, the Tennessee Supreme Court issued its decision in *State* v. *Johnson*, No. M1987-00072-SC-DPE-DD, 2006 Tenn. LEXIS 1236 (Oct. 6, 2006), holding that "no statute, rule of court, or constitutional provision" authorized the court to appoint clemency counsel. *Id.* at *2-*3. The court stated that its appointment order in *Harbison* was limited to state court proceedings related to the conviction or sentence and "did not extend the appointment of counsel to clemency proceedings." *Id.* at *3.

4. On December 13, 2006, Mr. Harbison's appointed federal habeas counsel moved the district court to expand her authorized scope of representation to include state clemency proceedings. R.156-1. The district court denied the motion on January 16,

2007, holding that *House* v. *Bell*, 332 F.3d 997 (6th Cir. 2003)—which had held that Section 3599 did not authorize federally appointed counsel to represent death-row inmates in state-court post-conviction proceedings—also precluded the appointment of counsel for state clemency proceedings. Add. 29a-31a.[5]

On September 27, 2007, the Court of Appeals for the Sixth Circuit summarily affirmed the district court's order refusing to authorize Mr. Harbison's habeas counsel to represent him in clemency proceedings and also denied Mr. Harbison's motion for a certificate of appealability ("COA") on the issue. Add. 12a.[6] The court of appeals stated that "[i]t is not clear that Harbison requires a COA to appeal the district court's denial of this counsel motion," observing that it would follow a Fifth Circuit precedent "which found that no COA was required to appeal

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[5] Federal habeas counsel had not sought a stay of execution in connection with her motion to expand the scope of her representation to include clemency. While the appeal from the district court's denial of that motion was pending in the Sixth Circuit, Mr. Harbison received a reprieve of his February 22 execution date. Subsequently, the Tennessee Supreme Court set a new execution date of September 26, 2007. Then, on September 19, 2007, Mr. Harbison's execution was enjoined as a result of unrelated litigation. *Harbison* v. *Little*, 511 F. Supp. 2d 872, 903 (M.D. Tenn. 2007).

[6] Mr. Harbison had not initially sought a COA with respect to the clemency counsel issue, but on June 27, 2007, the Sixth Circuit directed him to file a motion for a COA. Mr. Harbison's motion asserted that the case was automatically appealable but requested a COA as ordered. Application for Certificate of Appealability at 2; see also Reply to Response to Application for Certificate of Appealability at 1 & 3 (noting the State of Tennessee's agreement that a COA was unnecessary and requesting the court of appeals to so hold).

from the denial of expert assistance under" Section 3599. Add. 11a. "However," the court stated, "even if a COA is required for this issue," because of the Sixth Circuit's prior ruling in *House* "that § 3599(e) * * * does not authorize federal compensation for legal representation in state matters, a COA should not be granted for this issue." *Ibid.*

Federal habeas counsel's request for expansion of the scope of her appointment was supported, inter alia, by an attachment summarizing information relevant to the clemency determination she proposed to seek for Mr. Harbison. The information concerning Mr. Harbison's personal and family background included the following:

School and juvenile court records identify Mr. Harbison as borderline mentally retarded, slow in all subject areas; his recommended placement was in "educably mentally retarded" classes.[7] Mr. Harbison was excessively timid, insecure and characterized by one of his teachers as "emotionally" out of it.[8]

Court records state that Mr. Harbison's home life was "horrible in all areas imaginable."[9] For example:

- The Harbison family lived in run-down, dirty shacks without running water or electricity. Mr. Harbison and his four siblings wore ragged and dirty, donated clothes.[10]

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[7] R.103, Att.B, Juvenile Court Records-Hearing Transcript 10/8/64 p.1.

[8] R.103, Att.B, Affidavit of Brian Hackett ¶ 3.

[9] R.103, Att.B., Juvenile Court Records-Social History 10/21/69.

[10] R.103, Att.B, Affidavit of James Tyrone Harbison ¶ 3; *id.*, Affidavit of Kenneth Jerome Johnson ¶ 3; *id.*, Affidavit of Brian

- As a child, Mr. Harbison's mother taught him and his siblings to scavenge for scrap metal and shoplift necessities, such as socks.[11]
- Mr. Harbison and his siblings started drinking at an early age, in part to overcome hunger pangs. They used water to replace the alcohol they drank from their parents' liquor supply. When their parents noticed the watered-down alcohol they would become enraged, not because the children were drinking, but because there was less alcohol for the parents to drink.[12]
- Mr. Harbison's parents engaged in drunken fights witnessed by the Harbison children. They injured each other with irons, broken bottles, and knives. They shot each other. Court records describe the parents' pattern of "stealing, aggressiveness, murder and attempting to do bodily harm."[13]
- Some of the worst injuries inflicted upon Mr. Harbison by his parents came from a power drill, gunshots, and being set on fire.[14] Neighbors heard about incest at the Harbison house. Harbison's father watched his

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Hackett ¶¶ 6-7; *id.*, Juvenile Court Records-Social History 10/21/69 p.1.; R.103, Att.B, Affidavit of Joyce Lynn Duke ¶ 2.

[11] R.103, Att.B, Affidavit of James Tyrone Harbison ¶ 3; R.103, Att.B, Affidavit of Kenneth Jerome Johnson ¶ 2.

[12] R.103, Att.B, Affidavit of Joyce Lynn Duke p.1.

[13] R.103, Att.B, Juvenile Court Records-Social History 10/21/69 p.1.

[14] R.103, Att. B, Affidavit of Catherine Elizabeth Harbison ¶ 3; *id.*, Affidavit of Brian Hackett ¶ 9.

daughters when they bathed and it was said that he impregnated the eldest.[15]

- When he was ten years old, Mr. Harbison witnessed his fourteen-year-old sister shoot her twenty-six-day-old son and her fourteen-month-old daughter. His sister was placed in a mental institution where she hanged herself.[16]
- Mr. Harbison watched his other sister's mental health decompensate to the point where she received, and continues to receive, frequent treatments at a local mental health facility.[17] Mr. Harbison was often left in charge of this sister because she was unable to care for herself.
- Mr. Harbison's brother committed crimes and Mr. Harbison watched his brother spend increasing amounts of time in jail.[18]

The psychological and emotional impairment resulting from this history causes Mr. Harbison difficulty with interpersonal relations, making decisions,

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[15] R.103, Att.B, Affidavit of Brian Hackett ¶¶ 7, 11; R.103, Att.B, Affidavit of Catherine Elizabeth Harbison ¶¶ 8-9 .

[16] R.103, Att.B, Erlanger Hospital Report 10/12/65; *id.*, Order of Commitment 10/19/65; *id.*, Death Certificate of Deborah Ann Harbison; *id.*, Affidavit of James Tyrone Harbison ¶ 9; *id.*, Affidavit of Kenneth Jerome Johnson ¶ 5; *id.*, Affidavit of Catherine Elizabeth Harbison ¶ 8; *id.*, Juvenile Court Records-Social History 10/21/69 p.1.

[17] R.103, Att.B, Affidavit of Catherine Elizabeth Harbison ¶ 7.

[18] R.103, Att. B, Affidavit of Catherine Elizabeth Harbison ¶ 5; *id.*, Juvenile Court Records-Hearing Transcript 9/11/69 p.4; *id.*, Social History 10/21/69 p.2.

and understanding the consequences of his actions. Mr. Harbison appears his chronological age but experiences the world at the emotional and intellectual equivalent of an adolescent.[19]

Mr. Harbison's background also reflects that he had not been charged with a crime before he was accused of Ms. Russell's murder. David Schreane, the brother of Mr. Harbison's girlfriend and a career criminal who was convicted of a second murder after he was released on his conviction for the murder here, told police Mr. Harbison committed this crime. However, police records that had not been disclosed to trial counsel showed that Schreane said he was going to "pin the crime" on Mr. Harbison. R.135, Att.B, Police Records p.186. Schreane initially told police another person, not Mr. Harbison, accompanied him at the crime scene. R.135, Att.B, Police Records p.79. Schreane later implicated Mr. Harbison out of jealousy and revenge and to diminish his own responsibility for the murder. R.135, Att.B Police Records pp. 115-18.[20]

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[19] R.103, Att.B, Affidavit of Dr. Toomer ¶¶ 12, 15.

[20] Two hundred and six police records were released to federal habeas counsel by the Chattanooga Police Department in 1997. (R.135, Att.B, Police Records). They also contain evidence showing that a third person, Ray Harrison, participated in Ms. Russell's murder. Harrison had a motive and admitted to his wife that he was in the victim's house at the time of the crime. Witnesses placed Harrison, as well as Schreane and another male who was not Mr. Harbison, across the street from the victim's house immediately before the time of the crime. On the advice of the same attorney who later represented Mr. Harbison on his motion for new trial and direct appeal, Harrison refused to cooperate with law enforcement by taking a polygraph examination. Harrison was extradited to Florida on burglary and

SUMMARY OF ARGUMENT

A certificate of appealability ("COA") was not needed to allow Mr. Harbison to obtain appellate review of the district court's order denying his request that appointed counsel represent him in the state clemency proceeding. The COA requirement applies only to an appeal of "the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court." 28 U.S.C. § 2253(c)(1)(A). That language means the order finally disposing of a habeas petitioner's challenges to his or her detention under state-court process. An order regulating the responsibilities of appointed counsel with respect to clemency proceedings—the order rendered in this case—is not such an order. It therefore may be reviewed by a court of appeals without a COA.

The text of Section 3599(e) states explicitly that the lawyer appointed to represent a state prisoner in federal habeas corpus proceedings under 28 U.S.C. § 2254 seeking to vacate a death sentence "shall also represent the defendant in such * * * proceedings for executive or other clemency as may be available to the defendant." Because the words of Section 3599 allow of only one meaning, they are where the proper analysis of *this* case ends. *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-54 (1992) ("in interpreting a statute a court should always turn first to one, cardinal cannon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. * * * When the words

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assault charges. He was never arrested or prosecuted in this case. R.135, Att.B, Police Records pp. 61 & 72.

of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete'").

"As in all statutory interpretation cases," analysis must "'begin with the language of the statute.'" *Intel Corp.* v. *Advanced Micro Devices, Inc.*, 542 U.S. 241, 255 (2004) (internal quotation marks omitted). Section 3599(e) states that appointed counsel "shall" represent the defendant in "such" clemency proceedings "as may be available to the defendant"—and the only clemency proceeding "available" to a state defendant is the one provided by state law—the statute's only possible meaning is that the responsibilities of appointed counsel include state clemency proceedings. Indeed, because persons convicted under federal law may obtain clemency only from the President, Section 3599(e)'s reference to "executive *or other* clemency" (emphasis added) confirms the inclusion of state clemency proceedings: "or other" is needed to encompass clemency processes in those States in which the governor is not the decisionmaker. The phrase would be surplusage if the statute were limited to federal clemency proceedings.

Given the clear meaning of the provision's words, that should be the end of the inquiry. "'When the statute's language is plain,'" the function of the courts is "'to enforce it according to its terms.'" *Lamie* v. *U.S. Trustee*, 540 U.S. 526, 534 (2004) (internal quotation marks omitted). The plain meaning of the clear terms of the governing statute here dictate that Mr. Harbison's federal habeas counsel shall represent him in available state clemency proceedings.

Some lower courts, and the Solicitor General in his amicus brief at the certiorari stage, justify a contrary result not by interpreting the statute, but by rewriting it to reach what they believe is a preferable

policy result. Even if their policy judgment were correct, none of their arguments provides any basis whatever for disregarding the unequivocal statutory text. "'Whatever temptations the statesmanship of policymaking might wisely suggest,' the judge's job is to construe the statute—not to make it better. The judge 'must not read in by way of creation,' but instead abide by the 'duty of restraint, th[e] humility of function as merely the translator of another's command.'" *Jones* v. *Bock*, 127 S. Ct. 910, 921 (2007) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Columbia L. Rev. 527, 533-34 (1947)).

ARGUMENT

I. A DISTRICT COURT'S DENIAL OF A REQUEST FOR APPOINTED COUNSEL UNDER SECTION 3599 IS APPEALABLE AS OF RIGHT.

The text of 28 U.S.C. § 2253 makes clear that a certificate of appealability ("COA") is not required to obtain appellate review of the district court's denial of petitioner's request for appointment of clemency counsel under Section 3599. Petitioner, Respondent (Br. 8-12), and the Solicitor General (U.S. Cert. Am. Br. 19-22) all agree that a COA was not required here.[21]

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[21] All parties also agree that the district court's order was a "final" determination properly before the court of appeals under 28 U.S.C. § 1291. As the Solicitor General points out, "the district court's order denying petitioner federally funded clemency counsel is a 'final' one, because it leaves no matters pending and is appealable immediately." U.S. Cert. Am. Br. 19 n.8.

Section 2253(c)(1)(A) provides that a COA is only required for an appeal of "the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court." A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2).

The plain meaning of the phrase "the final order in a habeas corpus proceeding" is the order finally disposing of the habeas petition challenging the petitioner's detention. *Miller-El* v. *Cockrell*, 537 U.S. 322, 327 (2003) ("Congress mandates that a prisoner seeking postconviction relief under 28 U.S.C. § 2254 has no automatic right to appeal a district court's denial or dismissal of the petition. Instead, petitioner must first seek and obtain a COA").

The district court's order refusing to expand the authority of habeas counsel to include representation of Mr. Harbison in clemency proceedings does not fall within that category. Rather, it addresses an entirely collateral matter having nothing to do with the claim of unlawful detention that is at the core of a habeas application. Accord, U.S. Cert. Am. Br. 20 ("[r]equests for clemency counsel * * * do not involve the pursuit of any federal legal challenge to the petitioner's conviction or death sentence").[22]

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[22] *Smith* v. *Dretke*, 422 F.3d 269, 288 (5th Cir. 2005) (COA not necessary to appeal the denial of funds for expert assistance); *Hain* v. *Mullin*, 324 F.3d 1146, 1147 n.1 (10th Cir. 2003), vacated on other grounds, 436 F.3d 1168 (10th Cir. 2006); *Weeks* v. *Jones*, 100 F.3d 124, 127 n.6 (11th Cir. 1996) (per curiam) (although a CPC is required to appeal the denial of habeas corpus relief, there is no such requirement in order to appeal the denial of the appointment of counsel); *Sterling* v. *Scott*, 57 F.3d 451, 454 n.3 (5th Cir. 1995) (there is no CPC require-

This Court accordingly should hold that a certificate of appealability is not required to appeal an order denying a request for appointed clemency counsel under Section 3599.

II. SECTION 3599 AUTHORIZES FEDERALLY APPOINTED COUNSEL TO REPRESENT CAPITAL DEFENDANTS IN STATE CLEMENCY PROCEEDINGS.

18 U.S.C. § 3599(a)(2) expressly requires a federal habeas court to appoint counsel for an indigent, condemned, otherwise-unrepresented, state defendant who is seeking to vacate or set aside his or her death sentence. The appointment of counsel is triggered by the defendant's pursuit of a "post conviction proceeding under section 2254." But once counsel is appointed, the scope of his or her responsibilities is governed by 18 U.S.C. § 3599(e).

Subsection (e) describes in detail the duties that must be performed by appointed counsel in a capital case, "[u]nless replaced by similarly qualified counsel." A specific proceeding enumerated in Subsection (e) in which appointed counsel "shall" represent the defendant is "such * * * proceedings for executive or other clemency as may be available to the defendant." For the defendant sentenced to death under

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ment to appeal the denial of the appointment or retention of counsel). See also *Gosier* v. *Welborn*, 175 F.3d 504, 506 (7th Cir. 1999) (a request for counsel under predecessor of Section 3599 is a "case" in the sense that it is subject to appellate review but it is not a case under Chapter 153 of Title 28, AEDPA). But see *Michael* v. *Horn*, 459 F.3d 411, 416, 418 (3d Cir. 2006) (implying a COA is required by considering whether it should issue before resolving the question of whether the district court violated predecessor of Section 3599 in dismissing appointed counsel).

state law, counsel's representation clearly extends to any available state clemency proceedings.

"[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. * * * When the words of a statute are unambiguous, * * * 'judicial inquiry is complete.'" *Connecticut National Bank* v. *Germain*, 503 U.S. 249, 253-54 (1992). The plain, unambiguous language of Section 3599(e)—specifying that appointed counsel's responsibilities include "proceedings for executive or other clemency as may be available to the defendant"—makes clear that the duties of counsel appointed to represent a state capital defendant in a Section 2254 proceeding include representing that defendant in subsequent state clemency proceedings.

Some lower courts have reached the contrary conclusion, frankly acknowledging that their construction inserts into the statute words Congress did not write. But this Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Germain*, 503 U.S. at 253-54. It should reaffirm that principle in this case and hold that Congress meant what it said when it enacted Section 3599.

A. The Plain Language Of Section 3599 Provides That Appointed Attorneys "Shall" Represent Clients In Any Available Proceedings For Executive Or Other Clemency.

Section 3599(a)(2) sets forth the circumstances under which a federal court must appoint counsel for a defendant who seeks to vacate or set aside a sentence under 28 U.S.C. § 2254 or § 2255. The defen-

dant must be under a sentence of death, must be indigent, and must be unable otherwise to obtain adequate counsel. When these conditions are satisfied, the defendant "shall be entitled to" federally appointed counsel.

Section 3599(e)'s description of appointed counsel's responsibilities parallels the progression of legal processes faced by and available to capital defendants:

> Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed *shall represent the defendant throughout every subsequent stage of available judicial proceedings*, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and *shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.*

18 U.S.C. § 3599(e) (emphasis added).

Subsection (e) thus imposes two distinct duties on attorneys appointed to represent petitioners in Section 2254 proceedings. First, the statute directs that the appointed attorney "shall represent the defendant throughout every subsequent stage of available judicial proceedings." When the attorney is appointed pursuant to Section 3599(a)(2), in a Section 2254 proceeding following the entry of a judgment of

conviction, that roster of stages includes "all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures."

Second, the appointed attorney "shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant."

1. ***Appointed counsel's representation expressly encompasses "proceedings for * * * clemency as may be available to the defendant."***

Section 3599(a)(2) expressly provides for appointment of counsel in capital postconviction proceedings "under section 2254" in accordance with subsections (b)-(f). When counsel is appointed under Section 3599(a)(2) to represent a state capital defendant in federal habeas, the clemency proceedings provided by state authority are plainly "proceedings for * * * clemency * * * available to [that] defendant," as described in Section 3599(e).

The only proceedings that may be brought under Section 2254 are those instituted by *state* prisoners. The only source of clemency available to state prisoners is *state* clemency proceedings. And Section 3599(e) says that federal habeas counsel appointed for these death-sentenced state inmates "*shall*" represent them in whatever "proceedings for * * * clemency as may be available" to them (emphasis added). Subsection (e) therefore requires the appointed attorney to represent the state defendant in state clemency proceedings.

The contrary result can be reached only by rewriting the statutory text. But doing so renders the

statute incoherent and self-contradictory. As noted, Section 3599(e) expressly requires counsel appointed in Section 2254 proceedings to represent capital defendants in available clemency proceedings. But the only defendants who can maintain Section 2254 proceedings are those convicted in a state court; and federal clemency proceedings are never available to such defendants. See *Young* v. *United States*, 97 U.S. 39, 66 (1877) ("if there is no offence against the laws of the United States, there can be no pardon by the President"). Interpreting subsection (e) to permit representation only in federal clemency proceedings thus would direct counsel appointed in Section 2254 proceedings to represent their clients in "available" clemency proceedings that cannot possibly ever be available.

This "effort to trump [the] regular English" of Section 3599(e) (*Watson* v. *United States*, 128 S.Ct. 579, 585 (2007)) is indefensible. As the en banc Tenth Circuit correctly concluded, the statute "employs clear and precise language, admitting of no ambiguity and leaving no room for interpretation." *Hain* v. *Mullin*, 436 F.3d 1168, 1171 (10th Cir. 2006). "One need look no further than the statute's plain language to see that Congress has directed that counsel appointed to represent state death row inmates during § 2254 proceedings must" represent the defendant in state clemency proceedings; "we * * * see no other logical way to read the statute." *Id.* at 1172; accord, *Hill* v. *Lockhart*, 992 F.2d 801, 803 (8th Cir. 1993).

2. *The phrase "proceedings for executive or other clemency" confirms the inclusion of state clemency proceedings.*

The same conclusion follows from yet another aspect of the statute's plain language. Section 3599(e) says that court-appointed federal habeas counsel must represent their clients in "proceedings for executive *or other* clemency" (emphasis added) The only clemency proceedings available to individuals sentenced to death under federal law are "executive." That is so—as Congress would have known—because no one but the President has the power to grant pardons or clemency for offenses under federal law. U.S. Const., Art. II, § 2, Cl. 1 (conferring upon the President "Power to grant Reprieves and Pardons for Offenses against the United States").

The word "other" preceding the word "clemency" in Section 3599(e) therefore cannot refer to federal clemency. It must have been included in the statute to assure that all of the several forms of clemency procedures utilized by different State jurisdictions would be encompassed within the statute.

The States use a variety of decision making procedures for administering clemency. Some follow the federal model and confer all authority on their chief executive officer, the governor. In those States, the governor may be the sole decisionmaker or may share the decision with a board that makes either binding or non-binding recommendations. See Margaret Colgate Love, *Relief from Collateral Consequences of a Criminal Conviction: A State-by-State Resource Guide* 23 & 29 (2006).

Other States confer upon a clemency board sole authority to decide clemency requests. Margaret Colgate Love, *supra*, at 23-24 & 26. Still other states vest clemency authority exclusively in the legislature, while others vest that power in both the legislature and the executive, and still others in both the executive and the judiciary. See *Hain*, 436 F.3d at 1174 (citing examples); see also *id.* at n.8 (same). Congress manifestly added "other" clemency to "executive" clemency in subsection (e) in order to take account of the different clemency decisionmakers recognized by state law, some of which cannot be characterized as "executive."

This Court has long recognized the "cardinal principle of statutory construction that we must 'give effect, if possible, to every clause and word of a statute.'" *Williams* v. *Taylor*, 529 U.S. 362, 404 (2000) (quoting *United States* v. *Menasche*, 348 U.S. 528, 538-39 (1955)). In light of the absence of any non-executive clemency proceedings available to federal capital defendants, the Solicitor General's proposed construction of Section 3599(e) as limited to federal clemency proceedings would make "or other" meaningless surplusage and therefore violate this cardinal principle. The only way to give effect to the words "or other" is to recognize that Section 3599(e) includes state clemency proceedings, including those that involve decision makers other than the chief executive. See *Hain*, 436 F.3d at 1174 ("[t]he statute's reference to 'other clemency' is meaningless unless it refers to state clemency proceedings, as executive clemency is the only form of clemency in the federal system").[23]

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[23] The Solicitor General suggested in his brief at the *certiorari* stage (at 13-14) that the President could decide to seek the as-

In sum, the plain language of Section 3599 provides that counsel appointed to represent an indigent death-sentenced state prisoner in federal habeas corpus litigation is obligated by subsection (e) to continue to represent him or her in available state clemency proceedings—unless, of course, he or she is otherwise able to obtain adequate clemency counsel.[24]

B. There Is No Justification For Ignoring The Plain Language Enacted By Congress.

Notwithstanding the unambiguous terms and plain meaning of § 3599(e), some lower courts as well as the Solicitor General have ventured far beyond the statutory text in search of justifications for disregarding Congress's language and interpolating "the word 'federal' [as] an implied modifier for 'proceedings' when 'proceedings' are mentioned" in subsection (e). *King* v. *Moore*, 312 F.3d 1365, 1367 (11th Cir. 2002) (per curiam).

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sistance of other officials in reviewing clemency applications and that "or other" was included by Congress to cover such a hypothetical process. But even if the President employed an advisory board, any activity by that board would be part of a "proceeding[] for executive * * * clemency" because the ultimate clemency decision would have to be made by the President as the sole federal constitutional repository of the clemency power. See *Hain*, 436 F.3d at 1174 n.7 ("should the President appoint a board to assist in the exercise of clemency, any grant of clemency would remain a form of executive clemency").

[24] Some States provide appointed counsel to represent indigent capital defendants in clemency proceedings. In those States, the defendant would not be "unable to obtain adequate representation" for the clemency proceedings within the meaning of Section 3599(a)(2), and federal habeas counsel would not be required to represent the defendant in those proceedings.

It is, however, quite wrong to look outside the text where, as here, the text is unambiguous and no one has (or could) contend that enforcing the text as written leads to an absurd result. See, *e.g.*, *Lamie* v. *U.S. Trustee*, 540 U.S. at 534 ("[i]t is well established that when the statute's language is plain, the sole function of the courts — at least where the disposition required by the text is not absurd — is to enforce it according to its terms") (citations and internal quotation marks omitted); *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 431 (1987) ("we have considered ourselves bound to assume that the legislative purpose is expressed by the ordinary meaning of the words used") (citation and internal quotation marks omitted); *id.* at 452-53 (Scalia, J., concurring in the judgment) (recognizing the "venerable principle" that "[j]udges interpret laws rather than reconstruct legislators' intentions [and] [w]here the language of those laws is clear, we are not free to replace it with unenacted legislative intent").

The arguments that have been advanced for disrespecting the plain meaning of the text of Section 3559(e) are wholly unpersuasive.

1. *The absence of legislative history confirming that Congress meant what it said provides no basis for disregarding the statutory text.*

The courts of appeals that have refused to give effect to Section 3599's explicit language have rested their decisions in substantial part on a peculiar argument: that the *absence* of legislative history implies a lack of attention by Congress to the scope of the provision. Thus, the Eleventh Circuit pointed to "[t]he last minute nature of the amendment [regarding appointment of counsel] and the lack of recorded

debate about the issue." *King*, 312 F.3d at 1368; see also *House* v. *Bell*, 332 F.3d 997, 999 (6th Cir. 2003) (same); *Sterling* v. *Scott*, 57 F.3d 451, 456-457 (5th Cir. 1995) (characterizing the addition to Section 3599 of the reference to Section 2254 proceedings as a "statutory afterthought").

No principle of statutory construction makes legislative history a prerequisite to giving effect to unambiguous language that Congress enacts. Rather, by demanding that Congress do something more than state plainly the result which its words dictate, the lower courts that make this demand have turned statutory interpretation on its head. "The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself." *Conroy* v. *Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment) (citation, emphasis, and internal quotation marks omitted); see also *I.N.S.* v. *Cardoza-Fonseca*, 480 U.S. at 453 (Scalia, J., concurring in the judgment) (the enacted text always trumps unenacted legislative intent, even if one can be divined).

These courts' disparagement of the timing of Congress's action—"last minute" and "late in the session"—similarly provides no basis for disregarding Section 3599(e)'s plain language. Courts have no warrant to second-guess whether Congress has sufficiently pondered the language of proposed legislation before enacting it into law. Once a law has been adopted, the statutory language has legal force, and courts must interpret that language in accordance with its plain meaning.

A contrary approach would open the door to impressionistic assessments by courts of the extent to which Congress has considered the potential effects

of a statute. Not only do courts lack the capability and any objective standard for such an exercise, but the exercise is also forbidden by the respect due to a coordinate branch of government. It is presumptuous for a court to grade Congress for not doing its work, let alone to fault it for doing its work too quickly.

Moreover, Congress reenacted the relevant provisions in 2006. Even if the courts had any license to override the provision's plain language, on the theory that the language was introduced late in the legislative process and may not have received sufficient consideration at the time of its initial enactment, Congress's subsequent reaffirmation of precisely the same language eliminates any basis for such speculation.

The statutory provisions for counsel now contained in Section 3599 were originally enacted in 1988 as part of a statute creating a new federal capital offense, drug-related homicide. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7001(b), 102 Stat. 4393-94. They were included in one of the subsections of the statutory provisions creating the new offense and codified at 21 U.S.C. § 848q(4)-(10).

In 2006, Congress repealed the parts of Title 21 containing the provisions for appointment of counsel and reenacted them as Section 3599 of Title 18. See Terrorist Death Penalty Enhancement Act of 2005, Pub. L. No. 109-177, Tit. II, § 222, 120 Stat. 230, 231. This deliberate reenactment of the identical provisions destroys whatever basis the lower courts believed they had for denying clemency counsel to state capital defendants on the ground that the language explicitly providing for such counsel had been "hastily included" in 1988. See *House* v. *Bell*, 332 F.3d at

999; *King*, 312 F.3d at 1367-68; *Sterling* v. *Scott*, 57 F.3d at 457.[25]

2. *There was no settled consensus of judicial decisions for Congress to "ratify" when it reenacted the statute.*

The Solicitor General contends (U.S. Cert. Am. Br. 14-16) that Congress in 2006 ratified the pre-2006 decisions holding that the statute did not encompass representation in state clemency proceedings. But that argument requires this Court to ignore the several pre-2006 decisions holding that the statute did provide for representation in state clemency proceedings. There simply was no settled judicial interpretation of the provision that Congress could ratify when it acted in 2006.

In *Hill* v. *Lockhart*, 992 F.2d 801 (8th Cir. 1993), the court recognized that the predecessor of subsection (e) obligated appointed attorneys to represent defendants in state clemency proceedings and that the statute also required compensation for legal services "reasonably necessary to carry out" that obligation. It held that the statute's "plain language * * * evidences a congressional intent to insure that indigent state petitioners receive 'reasonably necessary' competency and clemency services from appointed, compensated counsel," explaining that such services were not reasonably necessary if the State provided a

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[25] These courts are also wrong as a matter of fact. The provision for appointment of habeas counsel was actually added to the bill before the language requiring appointed counsel to represent the defendant in available clemency proceedings. Compare Cong. Rec. H7281 with Cong. Rec. H7286 (Sept. 8, 1988).

mechanism for compensating counsel. 992 F.2d at 803.[26]

Several federal district courts also had concluded prior to 2006 that the statute allows federally appointed counsel to represent capital defendants in state clemency proceedings. See *Hickey* v. *Schomig*, 240 F. Supp. 2d 793, 795 (N.D. Ill. 2002) ("The plain language of [Section] 848(q)(8) requires counsel appointed for a habeas corpus petitioner who is under a state-imposed death sentence to represent the petitioner in connection with a later-filed petition seeking clemency from the state's authorities."); *United States* ex. rel. *Cloutier* v. *Schomig*, No. 00-5476, 2002 U.S. Dist. LEXIS 14229, at *5 (N.D. Ill. June 12, 2002) ("As the unequivocal language of [Section] 848(q)(8) indicates, once an attorney is appointed to represent an indigent defendant in a capital case, that attorney must represent the defendant through all available proceedings, including state clemency actions."); *Lowery* v. *Anderson*, 138 F. Supp. 2d 1123, 1125 (S.D. Ind. 2001) ("This court finds the plain language of [Section] 848(q)(8) to be controlling here,

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[26] The Solicitor General asserts (U.S. Cert. Am. Br. 8 & 15) that Congress's subsequent amendment of the statute to eliminate the "reasonably necessary" showing as a prerequisite for compensation of attorneys undermined the Eighth Circuit's rationale, but that is an untenable view of *Hill* in light of the *Hill* Court's reasoning. The Eighth Circuit relied on the language contained in what is now subsection (e) to hold that state clemency proceedings were encompassed within the statute; the "reasonably necessary" language limited that representation obligation. Congress's elimination of the limiting language leaves in place the court of appeals' conclusion that state clemency proceedings are included within the federal statute. And that is how other courts of appeals have understood *Hill*. See, *e.g.*, *Hain*, 436 F.3d at 1172.

consistent with the straightforward and persuasive reasoning of the Eighth Circuit in *Hill*"); *Strickler* v. *Greene*, 57 F. Supp. 2d 313, 315 (E.D. Va. 1999) (holding that the statutory text creates "an entitlement to paid counsel" for clemency). These decisions preclude the conclusion that there was any consensus in 2006 regarding the proper interpretation of the language that Congress reenacted that year.

C. Interpreting Section 3599 In Accordance With Its Plain Language Is Fully Consistent With The Statute's Objective.

Giving effect to the plain meaning of Section 3599's language is also consistent with Congress's aim in enacting Section 3599—to ensure "quality legal representation" in capital cases, because of "'the seriousness of the possible penalty and * * * the unique and complex nature of the litigation.'" *McFarland*, 512 U.S. at 855 (quoting 21 U.S.C. § 848(q)(7) (now codified at 18 U.S.C. § 3599(d))).

Clemency plays a critical role as "the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." *Herrera* v. *Collins*, 506 U.S. 390, 411-122 (1993) (footnote omitted); see also *Dretke* v. *Haley*, 541 U.S. 386, 399 (2004) (Kennedy, J., dissenting) ("the clemency power can correct injustices that the ordinary criminal process seems unable or unwilling to consider. These mechanisms hold out the promise that mercy is not foreign to our system. The law must serve the cause of justice").

The clemency process begins with a written submission that includes both factual and normative aspects. To invoke the process effectively, it is neces-

sary to ascertain the substantive norms that apply to the clemency determination and the kinds of arguments that have been successful in obtaining positive determinations in the past. It is also necessary to identify, gather, organize, evaluate, and present a wide range of factual information that is potentially pertinent to the question whether death is the appropriate punishment for the unique individual and for his or her crime. Often, this factual information is inadequately developed and documented in the judicial records of a case, and the reasons for the inadequacy must also be explored.

Here, for example, there is a very substantial body of facts to be marshaled in support of clemency for Mr. Harbison. Extensive information about his life history and mental state were not presented to his sentencing jury or to the courts reviewing his sentence. Police reports that have come to light only after the conclusion of all state-court proceedings indicate that an individual other than Mr. Harbison and David Schreane was present at the scene of the crime and that Mr. Harbison's trial counsel had previously represented the initial suspect in the murder investigation and may therefore have had an incentive to not reveal evidence relating to this other client's involvement—evidence that the federal habeas court concluded had emerged too late for the courts to consider. Mustering these fact-intensive arguments for proper consideration in the clemency process will be a complex task.

Preparing a well-developed case for clemency would be daunting work for any inmate. But the characteristics of capital defendants and the complexity of the materials that bear upon the clemency determination in their cases exacerbate the diffi-

culty. Studies of death row inmates have revealed a mean level of achievement or reading comprehension in the fifth to sixth grade range, even though mean formal schooling was above the ninth grade level. Mark D. Cunningham & Mark P. Vigen, *Death Row Inmate Characteristics, Adjustment, and Confinement: A Critical Review of the Literature*, 20 Behav. Sci. & Law 191, 200 (2002). A quarter or more of death row inmates have IQ scores in the borderline or mentally retarded range, *id.* at 199, and the high incidence of mental illness among death row inmates can contribute to diminished intellectual functioning, *id.* at 200.

Mr. Harbison suffers from these precise disabilities. He is utterly unable to organize the voluminous relevant facts of his case into an effective argument for clemency. If he is denied the assistance of counsel promised by the text of Section 3599, his clemency proceedings cannot possibly fulfill their vital role as "the 'fail-safe' in our criminal justice system." *Herrera*, 506 U.S. at 415.

Finally, enforcing Section 3599 according to its terms achieves a sound practical outcome. The lawyer who is appointed to represent a defendant in a Section 2254 proceeding will have invested substantial time and effort and, as a result, will be intimately familiar with most of the facts and considerations relevant to clemency. Clemency proceedings typically are initiated immediately following the denial of relief under Section 2254. It is efficient and sensible for that well-informed lawyer to utilize the information gathered in the Section 2254 process to prepare the defendant's clemency application. As the Tenth Circuit stated: "Congress did not want condemned men * * * to be abandoned by their counsel

at the last moment and left to navigate the sometimes labyrinthine clemency process from their jail cells, relying on limited resources and little education in a final attempt at convincing the government to spare their lives." *Hain*, 436 F.3d at 1175.

Accordingly, this Court should hold that counsel appointed pursuant to Section 3599(a)(2) to represent a defendant sentenced to death under state law may represent the defendant in subsequent state clemency proceedings when the defendant is otherwise unrepresented.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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ADDENDA

ADDENDUM A

1. 18 U.S.C. § 3599 provides:

(a)(1) Notwithstanding any other provision of law to the contrary, in every criminal action in which a defendant is charged with a crime which may be punishable by death, a defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services at any time either–

(A) before judgment; or

(B) after the entry of a judgment imposing a sentence of death but before the execution of that judgment;

shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f).

(2) In any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f).

(b) If the appointment is made before judgment, at least one attorney so appointed must have been admitted to practice in the court in which the prosecution is to be tried for not less than five years, and must have had not less than three years experience in the actual trial of felony prosecutions in that court.

(c) If the appointment is made after judgment, at least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases.

(d) With respect to subsections (b) and (c), the court, for good cause, may appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation.

(e) Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

(f) Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor under subsection (g). No ex parte

proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made concerning the need for confidentiality. Any such proceeding, communication, or request shall be transcribed and made a part of the record available for appellate review.

(g)(1) Compensation shall be paid to attorneys appointed under this subsection at a rate of not more than $125 per hour for in-court and out-of-court time. The Judicial Conference is authorized to raise the maximum for hourly payment specified in the paragraph up to the aggregate of the overall average percentages of the adjustments in the rates of pay for the General Schedule made pursuant to section 5305 of title 5 on or after such date. After the rates are raised under the preceding sentence, such hourly range may be raised at intervals of not less than one year, up to the aggregate of the overall average percentages of such adjustments made since the last raise under this paragraph.

(2) Fees and expenses paid for investigative, expert, and other reasonably necessary services authorized under subsection (f) shall not exceed $7,500 in any case, unless payment in excess of that limit is certified by the court, or by the United States magistrate judge, if the services were rendered in connection with the case disposed of entirely before such magistrate judge, as necessary to provide fair compensation for services of an unusual character or duration, and the amount of the excess payment is approved by the chief judge of the circuit. The chief judge of the circuit may delegate such approval authority to an active circuit judge.

(3) The amounts paid under this paragraph for services in any case shall be disclosed to the public, after the disposition of the petition.

2. 28 U.S.C.A. § 2253 provides:

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

ADDENDUM B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

EDWARD JEROME HARBISON,

Petitioner-Appellant,

v.

RICKY BELL, Warden,
Respondent-Appellee.

Nos. 06-6474, 06-6539, 07-5059

Appeal from the United States District Court for the Eastern District of Tennessee.
No. 97-00052—Curtis L. Collier, Chief District Judge.

Before: SILER, CLAY, and COOK, Circuit Judges.

SILER, J., delivered the opinion of the court, in which COOK, J., joined. CLAY, J., delivered a separate dissenting opinion.

OPINION

SILER, Circuit Judge. Petitioner Edward Jerome Harbison was convicted of first-degree murder, second-degree burglary, and grand larceny, and was sentenced to death. After unsuccessfully appealing through the Tennessee state courts, he petitioned in federal court for a writ of habeas corpus under 28 U.S.C. § 2254. After the district court denied relief in 2001, we affirmed the district court in *Harbison v. Bell*, 408 F.3d 823 (6th Cir. 2005). We will not repeat the facts as related in that opinion, except where they may be relevant to the current cases. While his habeas corpus claim was proceeding in the federal courts, in 2001, Harbison filed a motion in

state court to reopen his post-conviction petition, which he subsequently moved to treat as a petition for a writ of error coram nobis. In 2004, the trial court denied his motion as untimely, and the Tennessee Court of Criminal Appeals affirmed that decision. *Harbison* v. *State*, No. E2004-00885-CCA-R28-PD, 2005 Tenn. Crim. App. LEXIS 636, 2005 WL 1521910 (Tenn. Crim. App. June 27, 2005) (unpublished). Harbison thereafter filed these three matters in federal district court, and they came before us, either as appeals or on transfer from the district court. He also asks for a stay of execution. For the reasons stated thereafter, we affirm the district court's rulings and deny all other relief requested.

No. 06-6474

This case is an original action involving the district court's transfer of Harbison's request for permission to file a successive habeas corpus petition before this court for initial consideration under 28 U.S.C. § 2244(b)(3). Harbison's current pleading involves two claims previously raised in his initial *§ 2254* petition. First, he argues that pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), newly-available evidence previously withheld by the Chattanooga Police Department raises the possibility of other suspects in the homicide. Second, he argues that newly-discovered evidence reveals that the attorney who handled his motion for a new trial and his direct appeal had an impermissible conflict of interest.

The district court concluded that, while part of Harbison's argument was properly raised in a Rule 60(b) motion, a portion of his argument could only be raised in a successive § 2254 petition. If Harbison is attempting to raise new claims or present claims

previously adjudicated, those claims can only be raised in a successive § 2254 petition, *Gonzalez v. Crosby*, 545 U.S. 524, 531-32 (2005), and the district court properly transferred the case to this court so that Harbison could request permission to file a successive § 2254 petition. To the extent that Harbison is attempting to raise new issues or re-raise issues presented in his prior § 2254 petition, his current motion should be construed as an attempt to file a successive petition under § 2244(b)(3). Thus, he requires this court's authorization to file such a petition with the district court.

To obtain this permission, Harbison must make a prima facie showing either that: (1) a new rule of constitutional law applies to his case that the Supreme Court made retroactive to cases on collateral review; or (2) a newly-discovered factual predicate exists which, if proven, sufficiently establishes that no reasonable factfinder would have found Harbison guilty of the underlying offense but for constitutional error. 28 U.S.C. §§ 2244(b)(2) & 2244(b)(3)(C).

The requirements under the Antiterrorism and Effective Death Penalty Act (AEDPA) apply here. Harbison has not met the standard under either provision of § 2244(b)(2) that would allow him to file a successive petition. First, he does not rely on a new rule of constitutional law to justify filing a § 2254 petition. Second, while he does rely on newly-discovered evidence, the evidence is not sufficient to establish that no reasonable factfinder would have found him guilty of first-degree murder. We previously reviewed this evidence and concluded that it "is not sufficient to create a reasonable probability that the result of the trial would have been different [,]" *Harbison*, 408 F.3d at 834, and "was unlikely to

change the result of Harbison's trial." *Id.* at 836. Therefore, Harbison's request for authorization to file a successive § 2254 petition will be denied.

No. 06-6539

In this case, Harbison appeals from the district court's denial of his Rule 60(b) motion. Initially, Harbison is required to obtain a Certificate of Appealability (COA) in order to receive a full review of his claims in this appeal. *See United States v. Hardin*, 481 F.3d 924, 925-26 (6th Cir. 2007).

Harbison has not demonstrated that he is entitled to a COA. Under 28 U.S.C. § 2253(c)(2), the court should grant a COA for an issue raised in a § 2254 petition only if the petitioner has made a substantial showing of the denial of a federal constitutional right. A petitioner satisfies this standard by demonstrating that reasonable jurists could disagree with the district court's resolution of his constitutional claims or that jurists could conclude that the issues raised are adequate to deserve further review. *Banks v. Dretke*, 540 U.S. 668, 705 (2004).

Harbison has not shown that reasonable jurists would disagree with the district court's dismissal of his Rule 60(b) motion or that the issue is adequate to deserve further review. He argued in his Rule 60(b) motion that the two claims from his § 2254 petition should not have been dismissed as procedurally defaulted. Because Harbison had not raised these claims in state court before presenting them in his initial § 2254 petition, we concluded that the claims were procedurally defaulted because he had no remaining state court remedies through which he could raise the claims. *Harbison*, 408 F.3d at 830-33 & 836.

The district court determined that Harbison's motion was brought under Fed. R. Civ. P. 60(b)(6), which is the residual clause. A movant's claims can be brought under Rule 60(b)(6) only if they cannot be brought under another clause of Rule 60(b). *Abdur'Rahman v. Bell*, 493 F.3d 738, 741 (6th Cir. 2007). However, Harbison's argument is more properly brought under Rule 60(b)(1), which provides for relief on the basis of mistake, inadvertence, or excusable neglect. In his Rule 60(b) motion, Harbison maintained that the district court and this court committed legal error or mistake because state court remedies remained for his claims and, therefore, they were not procedurally defaulted. Since Harbison is alleging legal error, he had to bring his motion within the normal time for taking an appeal from the district court's judgment. *Townsend v. Soc. Sec. Admin.*, 486 F.3d 127, 133 (6th Cir. 2007). Even if Harbison's motion is construed as brought under the more general provisions of Rule 60(b)(1), he was still required to file his motion within one year after the judgment was entered. *See Abdur'Rahman*, 493 F.3d at 741. The district court dismissed Harbison's initial § 2254 petition in March 2001, and Harbison did not file his Rule 60(b) motion until April 2006. Therefore, his motion, if filed under Rule 60(b)(1), was untimely.

Even if Harbison's motion is construed as filed under Rule 60(b)(6), he still has not demonstrated that the issue is adequate to merit further review. Motions under Rule 60(b)(6) do not have a time limit, but a movant is required to demonstrate extraordinary circumstances which would justify reopening a final judgment. *Gonzalez*, 545 U.S. at 535. Relief under Rule 60(b)(6) should be granted only in unusual and extreme situations where principles of eq-

uity mandate relief. *GenCorp., Inc. v. Olin Corp.*, 477 F.3d 368, 373 (6th Cir. 2007).

While Harbison's argument concerning the procedural default of his claims is somewhat correct, it is not sufficient to meet the high standard required for 60(b)(6) relief. Although this court and the district court may have incorrectly determined that Harbison had procedurally defaulted his two claims on the basis that he had no state court remedies remaining, he still procedurally defaulted in state court. The Tennessee Court of Criminal Appeals found that Harbison could not raise in a coram nobis petition his claim that one of his attorneys suffered from a conflict of interest, but implied that he could raise a *Brady* claim in a coram nobis petition. Nevertheless, it found that his petition for the *Brady* claim was untimely and the merits of the claim were not sufficient to outweigh the untimeliness of his petition. *See Harbison*, 2005 Tenn. Crim. App. LEXIS 636, 2005 WL 1521910, at *5-6.

Therefore, Harbison still procedurally defaulted his *Brady* claim in state court, but on the basis of his failure to timely pursue his relief rather than on the unavailability of state court remedies. Harbison must establish cause and prejudice to excuse this procedural default in order to obtain review of his *Brady* claim. *Bousley v. United States*, 523 U.S. 614, 622 (1998). We previously rejected his claims for cause and prejudice. *See Harbison*, 408 F.3d at 833-36. We also previously concluded that Harbison procedurally defaulted his claim on the conflict of interest by his attorney and had not demonstrated cause and preju-dice to excuse the procedural default. *Id.* at 836.

Therefore, Harbison has not demonstrated that an adequate issue exists concerning whether extraordinary circumstances are present to justify Rule 60(b) relief, so we will deny his motion for a COA.

No. 07-5059

In this case, Harbison appeals from the district court's denial of his motion to alter or amend the judgment and the denial of his request to authorize the Federal Public Defender Services to represent him in state clemency proceedings. However, in his COA application, he only challenges the district court's decision denying his request to appoint counsel to represent him in the clemency proceedings under 18 U.S.C. § 3599(e).

It is not clear that Harbison requires a COA to appeal the district court's denial of this counsel motion. Although we have never held that a COA is required to appeal from a final order denying counsel in a clemency proceeding, we would follow the implied rule from *Smith v. Dretke*, 422 F.3d 269, 288 (5th Cir. 2005), which found that no COA was required to appeal from the denial of expert assistance under 21 U.S.C. § 848(q). However, even if a COA is required for this issue, because we have previously ruled in *House v. Bell*, 332 F.3d 997, 998-99 (6th Cir. 2003) (en banc) (order), that § 3599(e) (as previously codified at 21 U.S.C. § 848(q)(4)(B)) does not authorize federal compensation for legal representation in state matters, a COA should not be granted for this issue.

Conclusion

Therefore, we hereby:

1. Deny the request for authorization to file the successive § 2254 petition. (No. 06-6474).

2. Deny the motion for a COA on the Rule 60(b) motion. (No. 06-6539).

3. Deny the motion for a COA for the Federal Public Defender Services to represent Harbison in state clemency proceedings. (No. 07-5059).

4. Deny the accompanying motions to stay execution.

5. Affirm the district court in its rulings in these cases.

CLAY, Circuit Judge, dissenting. I dissented with respect to the prior panel opinion in this matter, *Harbison v. Bell,* 408 F.3d 823 (6th Cir. 2005), because the district court improperly failed to grant Harbison's petition for a writ of habeas corpus on the ground that the prosecution violated *Brady v. Maryland,* 373 U.S. 83 (1963); and Harbison had demonstrated cause and actual prejudice for his failure to raise his *Brady* claim in state court prior to seeking habeas relief in federal court. Despite several court orders compelling disclosure of exculpatory materials from the Chattanooga Police Department records which indicate that another individual, Ray Harrison, had the motive and opportunity to murder Edith Russell and burglarize her home, the majority in the prior panel decision dismissed the materiality of the exculpatory evidence by engaging in the crassest form of speculation in an attempt to minimize the importance of the evidence. Nor did the panel majority adequately explain or justify the withholding of

the jail house statements of potential witness, David Schreane, regarding Detective Foster's notes concerning Schreane's motive to falsely implicate Harbison in the murder. Because of the panel majority's denial of the habeas petition in 2005, Harbison was never accorded sufficient opportunity to demonstrate that Ray Harrison's wife placed Harrison at the scene of the crime, thereby buttressing Harbison's alibi defense to the murder charge. As a result, Harbison was effectively prevented from demonstrating his innocence inasmuch as he might have used the suppressed evidence to aid his acquittal by shifting the blame for the murder to Harrison. In other words, the prosecution's *Brady* violation denied Harbison the right to present his best possible defense to the jury. Furthermore, as explained by my prior dissent in this matter, at 408 F.3d at 841, Harbison did not procedurally default his *Brady* claim or, if he did, such procedural default should have been excused by the showing of cause for the default, and prejudice resulting from the default, as explained in excruciating detail by the aforesaid dissent. The dissent goes to great lengths to explain why there was cause for the procedural default, notwithstanding the purported lack of evidence of deliberate prosecutorial concealment. Consequently, the panel majority's failure to provide habeas relief based on the *Brady* claim means that it is entirely possible that Edward Harbison, who was scheduled for execution on September 26, 2007, may be actually innocent of the offense for which he is to be executed.

In order for the majority in the instant appeal, in Case Nos. 06-6474 and 06-6539, to conclude, as it does, that Harbison cannot obtain any relief because he cannot demonstrate that "a newly-discovered factual predicate exists which, if proven, sufficiently es-

tablishes that no reasonable fact finder would have found Harbison guilty of the underlying offense but for constitutional error," the majority has to implicitly rely upon its prior unsupportable and unpersuasive holdings in the prior panel opinion, reported at 408 F.3d 823, to the effect that there was no *Brady* violation in connection with the state court trial; that there was no improper withholding of evidence that should have been divulged to petitioner; and that petitioner had no justification for failing to come forward with exonerating evidence that he did not know about because it had been concealed or withheld from him. The circular rationale and the illogic of the majority's application of death penalty jurisprudence in this case operate to defeat the principle of the Brady case that convictions are not to be obtained based upon evidence which is concealed, or not disclosed. In the instant appeal, the majority justifies its inability or unwillingness to grant relief based upon its prior improper determination that Harbison is not entitled to the protection of the Brady case and therefore concludes that Harbison should not be afforded the opportunity to file a successive habeas petition or be granted a certificate of appealability with respect to Harbison's Rule 60(b) motion. I therefore respectfully dissent.

ADDENDUM C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

EDWARD JEROME HARBISON,

Petitioner,

v.

RICKY BELL, Warden,

Respondent.

NO. 1:97-CV-52

Judge Curtis L. Collier

MEMORANDUM and ORDER

Edward Jerome Harbison ("Harbison"), a Tennessee prison inmate awaiting execution, filed this case as a petition for a writ of habeas corpus pursuant to 28 U.S.C.§ 2241, et seq. (Court File No. 135) or, alternatively, as a motion for relief from judgment under Rule 60(b) of the Federal Rules of Civil Procedure. Harbison has now filed two motions–a motion to alter or amend (Court File No. 154) and a motion to expand the appointment of counsel (Court File No. 156) Respondent Rickey Bell, Warden ("Respondent") filed a response to the motion to alter or amend (Court File No. 157).

Because the Court finds Harbison's motions are not well taken and are not supported by governing law, the Court **DENIES** both motions.

III. DISCUSSION

A. Procedural History

This case began in 1997 when Habison first filed his habeas petition. In 2001 the Court granted summary judgment to Respondent and dismissed the petition (Court File No. 102). Harbison appealed this Court's decision to the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit")(Court File No. 122). In 2005 the Sixth Circuit affirmed the Court's decision (Court File No. 128). Harbison filed a writ of certiorari with the United States Supreme Court and also file a second petition for the writ of habeas corpus (Court File No. 135). Included in this petition was also a request for relief from the judgment.

Based upon the clear statutory law and case law precedents, this Court issued an order and memorandum, denying the motion for relief from judgment and transferring the petition part of the filing to the Sixth Circuit (Court File No. 152, Order of Court; Court File No. 151, Memorandum of Law).

In reaction to this order, Habison now brings these two new motions, his Motion to Alter or Amend Order and Memorandum and his Request for Leave to Expand Appointment Order.

The Court will discuss them in turn.

B. Motion to Alter or Amend

Harbison argues the Court should amend its order and memorandum to include "findings as to whether the state procedural bar as applied to this case and discussed in the memorandum rests upon independent state grounds." (Court File No.154, Motion to Alter or Amend). In the body of the motion

Harbison mentions Fed. R .Civ.P. 52 (b) and 59 as authority for his request. Later on he mentions Fed. R. Civ. 60(b). It is not at all clear from his arguments which rule he relies upon because he had made no effort to demonstrate he has complied with the requirements of any of the three rules.

The Court's order was entered on November 28, 2006. This motion was filed on December 7, 2006. Rule 52 by its very terms applies to instances where the court has tried a case without a jury. Obviously, no such trial took place in this case. How Rule 52 is applicable is not stated.

Rule 59(e) authorizes motions to alter or amend a judgment if filed within ten days. However, under Rule 59(e), the district court has considerable discretion whether to alter or amend or reconsider an earlier ruling. *Edward H. Bohlin Co., Inc. v. Banning Co., Inc.*, 6 F.3d 350, 355 (5th Cir. 1993); *Columbia Gas Transmission Corp. v. Limited Corp.*, 951 F.2d 110, 112 (6th Cir. 1991). The court must balance the need for finality with the need to render just decisions. *Edward H. Bohlin Co., Inc.*, 6 F.3d at 355. However, '[i]n practice, because of the narrow purposes for which they are intended, Rule 59(e) motions typically are denied.' Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2810.1 at 128; *see also Ruscavage v. Zuratt*, 831 F. Supp. 417, 418 (E.D. Pa. 1993) (noting Rule 59(e) motions "should be granted sparingly because of the interests in finality and conservation of judicial resources").

A Rule 59(e) motion is "aimed at reconsideration, not initial consideration." *F.D.I.C. v. World University Inc.*, 978 F.2d 10, 16 (1st Cir. 1992) (citations omitted). A party should not use the motion to "raise arguments which could, and should, have been

made before judgment issued." *Id.* Thus, the motion should "either clearly establish a manifest error of law or must present newly discovered evidence." *Id.* Evidence brought to a court's attention under Rule 59(e) must have been previously "unavailable." *Lostumbo v. Bethlehem Steel, Inc.*, 8 F.3d 569, 570 (7th Cir. 1993); *Atlantic States Legal Foundation v. Karg Bros.*, 841 F. Supp. 51, 53 (N.D.N.Y. 1993) (noting a court is justified in reconsidering its earlier ruling if "new evidence not previously available comes to light"). "Newly discovered evidence" is that which is "truly newly discovered or ... could not have been found by due diligence." *Atlantic States*, 841 F. Supp. at 56 (citation omitted).

Rule 60(b) permits motions for relief from judgment in very limited circumstances. Rule 60(b) provides:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:
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> (1) mistake, inadvertence, surprise, or excusable neglect;
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> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)
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> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
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> (4) the judgment is void;
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> (5) the judgment has been satisfied, released, or discharged, or a prior judgment

upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(6) any other reason justifying relief from the operation of the judgment.

To prevail under Rule 60(b) a petitioner must demonstrate the presence of "a clear error of law, newly discovered evidence, an intervening change in controlling law, or to prevent manifest injustice." See *GenCorp, Inc. v. Am. Int'l Underwriters*, 178 F.3d 804, 834 (6th Cir. 1999).

Harbison has made no effort to show a manifest error of law or the existence of any newly discovered evidence as required by Rule 59(e). Nor has he made an effort to show any of the first five categories of Rule 60(b) applies. For that reason he may be relying upon the catchall category of Rule 60(b)(6). However, under this provision he is still required to 'show 'extraordinary circumstances' justifying the reopening of a final judgment.' *Gonzalez v. Crosby*, 545 U.S. 524 (2005) (quoting *Ackermann v. United States*, 340 U.S. 193, 199 (1950)).

Since Harbison has made no effort to demonstrate he falls within any rule permitting the Court to alter, amend or reconsider the Court's earlier order, the Court **DENIES** the motion to alter or amend (Court File No. 154).

Had the Court determined Harbison had demonstrated he had complied with Rule 59(e) or Rule 60(b), and the Court had considered the merits of the motion, the Court would nevertheless have denied his motion for the following reasons. In this motion, Harbison asks the Court to alter or amend its prior

order and memorandum, but only with respect to the first ruling (i.e., with regard to the Rule 60(b) motion) (Court File No.154). Harbison suggests, in his present motion, that the part of the order and memorandum involving the Rule 60(b) motion be modified to include an inquiry into whether the procedural bar found by the state court is independent of federal law (the third factor in the four-factor test in *Maupin v. Smith*, 785 F.2d 135 (6th Cir. 1986)).[1] The Respondent objects to the motion to alter (Court. File No. 157).

To place the present motion in context, Harbison's Rule 60(b) motion must be revisited. In the earlier motion, Harbison maintained the Court incorrectly ruled that certain claims raised in his original petition had never been presented to the state courts; could not then be presented; and, therefore, were procedurally barred. Harbison also maintained that, after these rulings were issued, he went back to the state courts and exhausted various claims, including a claim of an alleged violation of the rule in *Brady v. Maryland*, 373 U.S. 83 (1963). The decision resulting from the latest state court proceedings, according to Harbison, showed this

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[1] Under *Maupin*, a court must make specific inquiries when a state asserts a petitioner's procedural default bars review of his federal claim. *See Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986). A court must determine: 1) whether there is a procedural rule which applied to a petitioner's claim and whether a petitioner complied with the rule; 2) whether the procedural rule was actually enforced against a petitioner; 3) whether it is an adequate and independent state ground sufficient to block habeas review; and 4) whether a petitioner can demonstrate cause for his failure to comply with the rule and prejudice resulting from the alleged constitutional violation. *Id.*, at 138.

Court's rulings with respect to those claims to be defective. Finally, in a marked exaggeration he asserted the defective rulings subverted the integrity of the Court's judgment.

The Court determined there was no merit to Harbison's assertions and denied the Rule 60(b) motion. First of all, this Court's prior conclusion that his claim had never been presented to the state courts and could not then be presented was indisputably correct at the time the conclusion was reached. Though the state courts permitted Harbison to file a motion to reopen his post-conviction petition (subsequently converted, upon his request, to a petition for a writ of error coram nobis), which was amended to include the *Brady* claim, the state courts did not review the claim on its merits but, instead, held the coram nobis petition was filed outside the statute of limitations. The Court's earlier determination of procedural default rested on one type of procedural default (i.e., a claim which is technically exhausted, yet procedurally defaulted),[2] but it now appears, since the state courts have actually employed Tennessee's coram nobis statute of limitations as a procedural bar to Harbison's *Brady* claim, it is the second type of procedural default which applies.

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[2] A petitioner who has never presented a claim in the state courts and who is barred from returning to those courts to present his claim meets the technical requirements of exhaustion because there are no state remedies left to exhaust. *Coleman v. Thompson*, 501 U.S. 722 (1991). A petitioner in this position has committed a procedural default which can only be overcome by a showing of cause to excuse the default and actual prejudice as a result of the alleged constitutional violation. *Sawyer v. Whitley*, 505 U.S. 333, 338 (1992); *Coleman*, 501 U.S. at 750.

This is important because, in the Sixth Circuit, the pertinent analysis for making a procedural default determination depends upon the type of procedural default asserted. A default in the latter category requires the application of *Maupin's* four-factor test, whereas a procedural default which falls within the former classification dispenses with the first three factors in the *Maupin* test and proceeds directly to the cause-and-prejudice factor. Harbison suggests, in his present motion, that the order and memorandum involving the Rule 60(b) motion be modified to include an inquiry into whether the procedural bar found by the state court rests upon grounds independent of federal law (the third factor in the four-factor *Maupin* test).

In one sense, it is doubtful[3] that a Rule 60(b) motion requires the Court to make new rulings concerning matters not addressed in the 2001 memorandum and order (which are, after all, the subjects of the Rule 60(b) motion) and, certainly, the Court did not address in its earlier entries whether the procedural scheme applied as a bar to the coram nobis petition was independent of federal law. Because the Court did address cause-and-prejudice in its original decision on the § 2254 petition, the Court re-examined its prior cause-and-prejudice findings, in light of the coram nobis proceedings, to determine whether those earlier findings were defective. Though the Court views the analysis under *Maupin* to be required when making a procedural default determination ab

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[3] Harbison provided the Court with no authority for the proposition it is proper to go back in time and make alternative or additional determinations long after judgment has been rendered.

initio, no such analysis is required when a prior determination of procedural default is merely being revisited under the aegis of Rule 60(b). Of course, this does not mean it would be inappropriate to apply the *Maupin* test *if* the Sixth Circuit authorizes Harbison to file a second or successive petition, see *Gonzalez v. Crosby,* 545 U.S. 524 (2005) (holding that a Rule 60(b) motion is not to be treated as a habeas corpus petition), and *if* the Respondent then asserts a procedural default with respect to the *Brady* claim, based on the recent state coram nobis proceedings.

There is a one-year statute of limitations governing the filing of coram nobis petitions, *see* Tenn. Code Ann. § 27-7-103 ("The writ of error coram nobis may be had within one (1) year after the judgment becomes final. . ."), with which Harbison did not comply. The state courts enforced the procedural bar. This satisfies *Maupin*'s first two factors.

The third factor requires the Court to determine whether the procedural bar constitutes an adequate and independent state ground sufficient to preclude habeas review. Where 'resolution of [a] state procedural law questions depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law.' *Ake v. Oklahoma,* 470 U.S. 68, 75 (1985). It is Harbison's contention, in his motion to alter, that the coram nobis limitations statute is not an independent state ground sufficient to bar federal review because the tolling procedure in *Burford v. State,* 845 S.W.2d 204 (Tenn.1992),[4] as applied in his case, required the

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[4] Under the rule in *Burford v. State,* 845 S.W.2d 204 (Tenn.1992), the one-year period is tolled when a strict application of the statute would deny a petitioner a reasonable oppor-

state courts to assess the strength of his claim under the *Brady* principles and because such an assessment depends on the state court's view of federal law. Hence, according to Harbison's theory, there can be no independent state procedural default.

Harbison's position is deficient for several reasons. First, the Court sees no discussion of the merits of a *Brady* claim in the state court opinion, much less a merits ruling on the claim. It is also telling that the analysis section of the opinion contains no reference to the *Brady* decision; no recitation of the elements of a *Brady* claim; and, not surprisingly, no application of those elements to the facts in Harbison's case. The more natural reading of the opinion is that the discussion of the allegedly suppressed evidence comprising the *Brady* claim was an integral part of the state court's determination as to whether the different-outcome prerequisite for coram nobis relief existed. It would have been impossible to reach a conclusion as to whether presentation of the suppressed evidence at trial would have resulted in a different outcome without discussing the missing evidence, as well as the proof adduced at trial.

Secondly, Harbison's contention regarding the state court's application of *Burford* to his coram nobis case, as least as it relates to the decision of the Court of Criminal Appeals, is not borne out by the state appellate court's opinion. Though the state appellate court cited *Burford's* holding that the statute of limitations must be tolled if the private interests

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tunity to pursue relief and thereby violate his due process rights. To determine whether a reasonable opportunity has been afforded, Tennessee courts balance a petitioner's liberty interest in having his claim heard against the state's interest in preventing litigation of stale or fraudulent claims.

of a petitioner outweigh the governmental interest in preventing stale and groundless claims, *Harbison v. State,* No. E2004-00885-CCA-R28-PD, 2005 Tenn. Crim. App. LEXIS 636, 2005 WL 1521910, *4 (Tenn. Crim. App. June 27, 2005), *permission to app. denied* 2005 Tenn. LEXIS 1176 (Tenn. Dec. 19, 2005), it did not discuss any private interests on the part of Harbison nor any interests on the part of the State, much less attempt to balance such interests. It is questionable as to whether *Burford* was actually applied since a mere citation to *Burford* does not do service as the balancing test required by Burford.

Third, even if the rule in *Burford* was applied in the coram nobis proceedings, the Court is mindful of the holding in a death-row inmate's habeas corpus case which involved a later-arising *Brady* claim. In *Hutchison v. Bell,* 303 F.3d 720 (2002), the Sixth Circuit considered whether a Tennessee post-conviction court's application of *Burford* and its subsequent finding of a procedural bar (the waiver rule) was intertwined with federal law and, thus, did not constitute an independent state law ground. Observing 'the decision to apply the *Burford* exception does not depend upon the state court's determination of the merits of the petitioner's constitutional challenges to his conviction or sentence,' the Sixth Circuit implicitly held the post-conviction statute of limitations with its *Burford* tolling mechanism to be an independent state law ground. *Id.* at 740-41 and n. 6.

The Court recognizes that Hutchison involved the one-year post-conviction statute of limitations while this case involves the one-year coram nobis limitations statute, but sees no compelling reason not to apply the same rationale to this case and now finds, to the extent such a finding is necessary, the

state court's decision not to apply the *Burford* exception in Harbison's case does not depend upon a merits review of the *Brady* claim and, therefore, the procedural bar to Harbision's coram nobis petition as found by the state court is independent of federal law.

The cause-and-prejudice factor in *Maupin* was addressed in the memorandum disposing of the Rule 60(b) motion, and no further discussion of this factor is sought or warranted.

Harbison also offers some arguments in his motion to alter which appear to have been recycled from his "§ 2241 et seq." petition/Rule 60(b) motion. To the extent these arguments relate to Harbison's § 2241 petition--and not to his assertion the Court should have determined whether the asserted state procedural bar was independent of federal law–those arguments are no more persuasive in the current motion than they were in his earlier filing. They are rejected.

C. Motion to Expand Appointment of Counsel.

In his last motion, Harbison seeks leave under 18 U.S.C. § 3006A[5] and § 3599 (formerly 21 U.S.C. § 848(q)(4)(B)8(e)), to extend the appointment of the Federal Defender Services of Eastern Tennessee, Inc., to permit it to represent him in his state clemency proceedings (Court File No. 157). Respondent has not responded to the motion. As bases for his motion, Harbison points to his execution date of Feb-

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[5] In relevant part, 18 U.S.C. § 3006 permits a court to appoint counsel to represent a state prisoner seeking habeas corpus relief under 28 U.S.C. § 2254. *See* 18 U.S.C. § 3006A(a)(2)(B).

ruary 22, 2007, and to a recent Tennessee Supreme Court opinion, which holds state law does not provide for the appointment of counsel in a clemency request to the Governor (*Id.*, Attach. D and Attach. E, *State v. Johnson,* No. M1987-00072-SC-DPE-DD 2006 Tenn. LEXIS 1236 (Tenn. Oct. 6, 2006) (per curiam order) (explaining, in reference to an order in Harbison's case, that the order did not extend the appointment of the Post-Conviction Defender to clemency proceedings)).

He has also submitted a supporting affidavit from Donald E. Dawson, the Post-Conviction Defender, who avers his office has a heavy caseload; does not have the funding or the staff to represent Harbison in the clemency matter; does not have the time to conduct an investigation or to review extensive state and federal court records involved prior to initiating the clemency proceedings; and simply cannot provide adequate assistance to Harbison in state clemency proceedings [*Id.*, Attach. F, Affidavit of Donald E. Dawson].

Dana Hanson Chavez, an attorney with the Federal Defender Services of Eastern Tennessee, Inc. ('FDSET'), who represents Harbison in these instant proceedings, indicates her client, though facing imminent execution, has been without state clemency counsel for three months; that FDSET has represented Harbison in his habeas corpus petition since 1997; and that, if Harbison is not granted relief in the courts, he intends to seek clemency from the Governor and, absent the granting of this motion, will be forced to "navigate the labyrinthine clemency process' *pro se*."

An indigent death-sentenced inmate is entitled to the appointment of counsel to represent him in a

section 2254 case, and 'each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings . . . and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant." 18 U.S.C. § 3599(a)(2) and (e).[6]

As Harbison notes, there is a circuit split on whether the statute (i.e., 18 U.S.C. § 848, now 18 U.S.C. § 3599), which authorizes the appointment of federal habeas corpus counsel, extends that appointment to state clemency proceedings. *Compare Hain v. Mullin*, 436 F.3d 1168 (10th Cir. 2006) (holding 'that counsel appointed under § 848(q)(4)(B) to represent state death row inmates in 28 U.S.C. § 2254 proceedings are authorized by the statute to represent these clients in state clemency proceedings') and *Hill v. Lockhart*, 992 F.2d 801 (8th Cir. 1993) (finding, under some circumstances, the statute extends to state clemency proceedings) with *Clark v. Johnson*, 278 F.3d 459 (5th Cir. 2002) (holding the statute does not extend representation in federal habeas corpus cases to state clemency proceedings) and *In re Lindsey*, 875 F.2d 1502 (11th Cir. 1989) (ruling the statute does not authorize federal compensation for representation in state proceedings).

This circuit, though not directly addressing the issue at hand, has determined in a closely analogous situation the statute does not entitle a death-row

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[6] Harbison also cites *to* 18 U.S.C. § 3006 as authority for his motion. In relevant part, 18 U.S.C. § 3006 provides for the appointment of counsel for a state prisoner seeking habeas corpus relief under 28 U.S.C. § 2254. *See* 18 U.S.C. § 3006A(a)(2)(B).

inmate to federally-funded counsel in state post-conviction cases. *See House v. Bell*, 332 F.3d 997 (6th Cir. 2003) (en banc). Narrowly construing the statute, the Sixth Circuit succinctly stated: "The rule is simple. The two representations shall not mix. The state will be responsible for state proceedings, and the federal government will be responsible for federal proceedings." *Id.* at 999.

Though the above language in *House* clearly indicates the Sixth Circuit would follow the same reasoning if asked to determine whether the statute provides for federally-appointed counsel during state clemency proceedings, the Western District has concluded that, under certain circumstances, the statute applies in state clemency proceedings. *See Alley v. Bell*, No. 97-cv-3159, 2006 U.S. Dist. LEXIS 94891 (W.D. Tenn.) (order of Mar. 10, 2005, entered as Court File No. 181). Citing to 18 U.S.C. § 3599(a)(2), the district court noted the government's duty to fund federally-appointed counsel in state clemency proceedings arises only if a petitioner "is or becomes financially unable to obtain adequate representation." 2006 U.S. Dist. LEXIS 94891, [order] at 4. Thus, if a state must furnish clemency counsel, the statute is not implicated since adequate representation is available. *Ibid. (citing Hain*, 436 F.3d at 1173 n.6).

While acknowledging the concerns expressed in *House* (i.e., that reading the statute as providing for federal counsel in state post-conviction proceedings would entitle a petitioner who succeeds in having his sentence vacated to federally appointed counsel in any resulting new state trial, state appeal, and state habeas corpus), the district court found that, where a petitioner has already failed in his endeavor to ob-

tain habeas corpus relief, *House's* directive that the "representations shall not mix" could be reconciled with the statutory instruction that counsel appointed during § 2254 proceedings "shall continue their representation." This reconciliation is made possible, according to the district court, by reading the statutory requirement for federally-funded counsel as being triggered only where a state is not obliged to furnish such representation since, under this circumstance, adequate representation is not available. Soon after, the petitioner submitted proof he had failed in his attempt to secure the services of the Post-Conviction Defender's office in the clemency proceedings, and the district court granted his motion, confirming federal funding for his federally-appointed counsel would extend to his state clemency proceedings. *Alley*, No. 97-cv-3159 (order of May 16, 2006, entered on the docket sheet as Court File No. 183).

Additionally, on November 15, 2006, after the district court's above decision in *Alley*, a three-judge panel of the Sixth Circuit considered a motion filed by counsel appointed to represent a death-sentenced Tennessee inmate in his § 2254 case. *See Abdus-Samad v. Bell*, No. 03-6404 (6th Cir. Nov. 15, 2006) (unpublished order). The motion sought court confirmation that the representation was to continue in state clemency proceedings. See *Abdus-Samad v. Bell, No.* 03-6404 (6th Cir. Nov. 15, 2006) (unpublished order). The Sixth Circuit panel, without any discussion, granted the motion. Like Harbison, Abdus-Samad had sought and failed to obtain relief in his previous § 2254 petition. *See Abdus-Samad v. Bell*, 420 F.3d. 614 (6th Cir. 2005), *cert. denied*, 127 S. Ct. 380 (2006).

While the Court respects the sentiments and reasoning stated in the district court's decision in *Alley* the Court is bound to follow and apply clear Sixth Circuit precedent. The Circuit spoke clearly and plainly in *House*. *House* is a published *en banc* decision. An unpublished panel decision that did not even discuss the issue is of no weight in the face of *House*. Harbison provides the Court with no basis to disregard *House* other than to argue *House* was wrongly decided. That is an argument that must be made to a higher court, not this Court.

Accordingly, Harbison's motion for the FDSET to represent him in state clemency matters (Court File No 156), is **DENIED**.

IV. CONCLUSION

For the reasons stated above, the Court **DENIES** Harbison's Motion to Alter and Amend (Court File No. 154) and Harbison's Motion for Leave to Expand Appointment Order (Court File No. 156).

SO ORDERED.

ENTER:

/s/_____

CURTIS L. COLLIER
CHIEF UNITED STATES DISTRICT JUDGE

RESPONDENT'S BRIEF

102

(2)

No. 07-8521

FILED
SEP 05 2008
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SUPREME COURT, U.S.

In The
Supreme Court of the United States

EDWARD JEROME HARBISON,

Petitioner,

v.

RICKY BELL, WARDEN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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16 A

CAPITAL CASE
QUESTIONS PRESENTED

The Terrorist Death Penalty Enhancement Act of 2005, Pub. L. No. 109-177, Tit. II, § 222(a), 120 Stat. 231 (2006) (to be codified at 18 U.S.C. § 3599 (2006)) (Section 3599), provides federal funding for counsel for indigent defendants and post-conviction litigants in federal capital cases. The questions presented are:

1. Whether Section 3599 provides prisoners sentenced under state law the right to federally appointed and funded counsel to pursue clemency under state law.

2. Whether a district court's order denying a request for federally funded counsel under Section 3599 may be appealed without a certificate of appealability issued pursuant to 28 U.S.C. § 2253(c).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. Br. Add. 5a) is reported at 503 F.3d 566. The relevant opinion of the district court (Pet. Br. Add. 15a) is unreported but may be found at 2007 WL 128954.

JURISDICTION

The judgment of the court of appeals was entered on September 27, 2007. The petition for a writ of certiorari was filed on December 21, 2007, and granted on June 23, 2008. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves an interpretation of 28 U.S.C. § 2253, which provides:

> (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> (b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the

validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

STATEMENT OF THE CASE

On January 15, 1983, petitioner burglarized the Chattanooga, Tennessee, home of Edith Russell, beat her to death with a heavy, marble vase when she came home unexpectedly, and stole various items of value belonging to her. A jury convicted him of first-degree murder, second-degree burglary, and grand larceny, and sentenced him to death for the murder.

The Tennessee Supreme Court affirmed the judgment. *State v. Harbison*, 704 S.W.2d 314, 315-16 (Tenn.), *cert. denied*, 476 U.S. 1153 (1986).

After unsuccessfully seeking state post-conviction relief, *see Harbison v. State*, 03C01-9204-CR-00125, 1996 WL 266114 (Tenn. Crim. App. May 20, 1996), *app. denied* (Tenn. Nov. 12, 1996), petitioner filed a motion for appointment of counsel and a motion for a stay of execution in the district court in February 1997. (No. 1:97-cv-00052, Docket Entry Nos. 1, 3 (E.D. Tenn. Feb. 5, 1997)). The motions were granted, and under the authority of the statute now codified at 18 U.S.C. § 3599, Federal Defender Services of Eastern Tennessee, Inc. (Federal Defender Services) was appointed to represent petitioner "in the preparing and filing of a petition for a writ of habeas corpus pursuant to 28 United States Code Section 2254 and all proceedings in connection therewith." (*Id.*, Docket Entry No. 5 (Feb. 7, 1997)). Through his appointed counsel, petitioner filed a federal habeas petition challenging his conviction and death sentence in November 1997. (*Id.*, Docket Entry No. 45 (Nov. 24, 1997)). The district court denied habeas corpus relief in 2001 (*id.*, Docket Entry No. 102 (Mar. 6, 2001)), and the court of appeals affirmed the judgment. *Harbison v. Bell*, 408 F.3d 823 (6th Cir. 2005), *cert. denied*, 547 U.S. 1101 (2006).

While his federal habeas corpus petition was proceeding in the federal courts, petitioner filed in state court both a motion to reopen his post-conviction petition and a petition for a writ of error

coram nobis. In 2004, the state trial court denied relief on procedural grounds, and the judgment was affirmed on appeal. *Harbison v. State*, No. E2004-00885-CCAR28PD, 2005 WL 1521910 (Tenn. Crim. App. June 27, 2005), *app. denied* (Tenn. Dec. 19, 2005).

In April 2006, petitioner, through Federal Defender Services, filed a second "petition for writ of habeas corpus" in the district court, alternatively requesting that the district court entertain the petition as a motion for relief from the 2001 judgment under Fed.R.Civ.P. 60(b)(6). (No. 1:97-cv-00052, Docket Entry No. 135 (E.D. Tenn. Apr. 19, 2006)). Treating the pleading as both a "second or successive habeas corpus application" under 28 U.S.C. § 2244 and a Rule 60(b)(6) motion, in November 2006 the district court denied the Rule 60(b)(6) motion and transferred the successive application to the court of appeals pursuant to 28 U.S.C. § 1631 for treatment as a motion for authorization to file a second or successive habeas corpus application. (*Id.*, Docket Entry No. 152 (Nov. 28, 2006)).

With a scheduled execution date of February 22, 2007, pending and state executive clemency proceedings apparently contemplated but not yet filed, Federal Defender Services filed on December 13, 2006, a motion requesting the district court to extend the appointment to include representation in Harbison's anticipated state clemency proceedings under 18 U.S.C. § 3599. (*Id.*, Docket Entry No. 156). Respondent did not oppose the motion. On January 16, 2007,

the district court denied the motion. (*Id.*, Docket Entry No. 158).

On February 1, 2007, the Governor of Tennessee granted an executive reprieve to petitioner until May 2, 2007, to allow the Department of Correction to review Tennessee's lethal-injection protocol. (No. 07-5059, Docket Entry of Feb. 2, 2007 (6th Cir.)). Following the expiration of the reprieve, the Tennessee Supreme Court set a new execution date of September 26, 2007. (*Id.*, Docket Entry of May 31, 2007). In the meantime, petitioner appealed from the district court's order denying the expansion of counsel's appointment. The court of appeals directed him to file an application for a certificate of appealability (COA) (*id.*, Docket Entry of June 27, 2007), which he did.[1] (*Id.*, Docket Entry of July 27, 2007).

On September 27, 2007, the court of appeals affirmed the judgment. In a published opinion, the court stated:

> It is not clear that Harbison requires a COA to appeal the district court's denial of this

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[1] While the appeal was pending, petitioner's execution by lethal injection was enjoined on September 19, 2007, by the United States District Court for the Middle District of Tennessee pending resolution of a Section 1983 action challenging Tennessee's lethal-injection protocol. *Harbison v. Little*, 511 F.Supp.2d 872 (M.D. Tenn. 2007), appeal pending, No. 07-6225 (6th Cir. filed Oct. 11, 2007). Following this Court's decision in *Baze v. Rees*, 128 S.Ct. 1521 (2008), the Sixth Circuit set a briefing schedule but left the injunction intact.

> counsel motion. Although we have never held that a COA is required to appeal from a final order denying counsel in a clemency proceeding, we would follow the implied rule from *Smith v. Dretke*, 422 F.3d 269, 288 (5th Cir. 2005), which found that no COA was required to appeal from the denial of expert assistance under 21 U.S.C. § 848(q). However, even if a COA is required for the issue, because we have previously ruled in *House v. Bell*, 332 F.3d 997, 998-99 (6th Cir. 2003) (en banc) (order), that § 3599(e) (as previously codified at 21 U.S.C. § 848(q)(4)(B)) does not authorize federal compensation for legal representation in state matters, a COA should not be granted for this issue.

(Pet. Br. Add. 11a). The court concluded that it would both "[d]eny the motion for a COA for [Federal Defender Services] to represent [petitioner] in state clemency proceedings" and "[a]ffirm the district court." (Pet. Br. Add. 11a-12a).

SUMMARY OF THE ARGUMENT

Because respondent has no real stake in whether a state prisoner receives federal funding for state clemency counsel, respondent expresses no view on Question 1. With respect to Question 2, the district court's order denying petitioner's motion for federally funded clemency counsel was not an order "in a habeas corpus proceeding" within the meaning of 28

U.S.C. § 2253(c)(1)(A). Therefore, a COA was not required.

ARGUMENT

I. RESPONDENT EXPRESSES NO VIEW ON THE QUESTION WHETHER 18 U.S.C. § 3599 PROVIDES STATE PRISONERS THE RIGHT TO FEDERALLY APPOINTED AND FUNDED COUNSEL TO PURSUE STATE CLEMENCY.

Question 1 presents the issue whether 18 U.S.C. § 3599 provides state prisoners the right to federally appointed and funded counsel to pursue clemency under state law. Respondent took no position on petitioner's motion in the district court and did not file any response to the motion. In the court of appeals, respondent took the position that, in denying petitioner's motion, the district court did not abuse its discretion by following circuit precedent holding that there was no statutory authorization for the appointment, but otherwise respondent did not express a view concerning whether that precedent was correctly decided. Because respondent has no real stake in whether an inmate receives federal funding for clemency counsel, respondent expresses no view on Question 1.

II. PETITIONER WAS NOT REQUIRED TO OBTAIN A COA IN ORDER TO APPEAL FROM THE DISTRICT COURT'S ORDER DENYING THE MOTION FOR FEDERALLY FUNDED CLEMENCY COUNSEL.

A COA is required before a habeas applicant may take an appeal to the court of appeals from "the final order in a habeas corpus proceeding in which the detention arises out of process issued by a State court." 28 U.S.C. § 2253(c)(1)(A). The order denying petitioner's motion for federally funded clemency counsel was not an order "in a habeas corpus proceeding."[2] Therefore, a COA was not required.

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[2] It is undisputed that the order denying the motion was a "final" one for purposes of the COA requirement. *Catlin v. United States*, 324 U.S. 229, 233 (1945) (a final judgment "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment"). And petitioner's custody under the 1983 state-court judgment "arises out of process issued by a state court."

Section 2253(c)'s reference to "the" final order in a habeas corpus proceeding at first blush suggests that a COA is required only from the one, ultimate order disposing of the habeas petition. But, in the Dictionary Act, 1 U.S.C. § 1, Congress made it clear that in the statutes it enacts, "unless the context indicates otherwise[,] words importing the singular include and apply to several persons, parties, or things. . . ." Thus, when necessary to carry out the evident intent behind § 2253(c)(1)(A), more than "the" final order in a habeas corpus proceeding is subject to the COA requirement. For example, an order denying a Fed.R.Civ.P. 60(b) motion seeking to reopen an earlier order denying habeas relief would require a COA because "the evident legislative intent behind requiring such certificates in habeas cases was to filter out undeserving appeals with a minimum of

(Continued on following page)

In § 2253(c)(1)(A), the phrase, "habeas corpus proceeding," is immediately followed and modified by the phrase, "in which the *detention* complained of arises out of process issued by a State court." (emphasis added). Both 28 U.S.C. § 2241(c)(3) and § 2254(a) make the writ of habeas corpus available to persons "in *custody* in violation of the Constitution or laws or treaties of the United States." (emphasis added). Thus, although not expressly defined by these statutes, a "habeas corpus proceeding" is a judicial proceeding for challenging a prisoner's detention or custody in violation of the Constitution, laws, or treaties of the United States.

In several cases establishing the dividing line between § 2254 relief and relief under 42 U.S.C. § 1983, this Court has defined the essence of the habeas corpus remedy. In *Preiser v. Rodriguez*, 411 U.S. 475 (1973), holding that a state prisoner cannot use a § 1983 action to challenge the fact or duration of his confinement, the Court declared that "[i]t is clear, not only from the language of §§ 2241(c)(3) and 2254(a), but also from the common-law history of the writ, that the essence of habeas corpus is an attack by a person in custody upon the legality of that custody,

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judicial effort, and that intent would be frustrated unless 'the final order' is interpreted to include final orders denying Rule 60(b) relief in habeas cases." *Gonzalez v. Secretary for the Dep't of Corr.*, 366 F.3d 1253, 1264 n.2 (11th Cir. 2004) (en banc), *aff'd on other grounds sub nom. Gonzalez v. Crosby*, 545 U.S. 524 (2005).

and that the traditional function of the writ is to secure release from illegal custody." 411 U.S. at 484. The Court described "the core of habeas corpus" as an attack upon "the very duration of . . . physical confinement itself." *Id.* at 487. In *Heck v. Humphrey*, 512 U.S. 477 (1994), the Court, on its way to holding that a state prisoner may not challenge the constitutionality of his conviction in a suit for damages under § 1983, echoed *Preiser*'s pronouncement that "habeas corpus is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement and seeks immediate or speedier release." 512 U.S. at 481; *see also Wilkinson v. Dotson*, 544 U.S. 74, 81 (2005) (characterizing "'core'" habeas corpus claims for relief as including requests for "present or future release").

State executive clemency, on the other hand, is not a federal judicial remedy. Indeed, this Court has characterized clemency as "the historic remedy for preventing miscarriages of justice *where judicial process has been exhausted.*" *Herrera v. Collins*, 506 U.S. 390, 412 (1993) (emphasis added). Nor does a request for clemency seek to invalidate the fact or duration of a prisoner's confinement or detention on legal grounds. Instead, the remedy sought is extrajudicial, purely discretionary, and "simply a unilateral hope," *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 465 (1981). And clearly clemency is not a remedy available in a habeas corpus proceeding. It is beyond the power of any federal court to grant clemency in a habeas corpus (or any other) proceeding.

While petitioner's motion for federally funded clemency counsel technically was filed under the style and docket number of petitioner's second application for habeas relief, it did not itself request habeas relief or request any action by the district court related to the habeas case itself. Instead, it requested authorization for representation in a future state executive clemency proceeding, a proceeding wholly distinct in both function and venue.

Furthermore, when petitioner's motion was filed on December 13, 2006, all habeas corpus proceedings challenging his state conviction and sentence had been concluded. Petitioner's initial federal habeas corpus proceeding was long over: the district court denied relief in 2001, the court of appeals affirmed the judgment in 2005, and this Court denied certiorari in April 2006. Even petitioner's second action had been concluded by November 28, 2006, when the district court denied the Rule 60(b)(6) motion and transferred the successive habeas application to the court of appeals for treatment as a motion for authorization to file a second or successive habeas corpus application. Therefore, petitioner's motion for clemency counsel can hardly be said to have been filed, or the order on that motion entered, "in" a habeas corpus proceeding.

The district court's January 16, 2007, order denying petitioner's motion for federally funded clemency counsel was not an order "in a habeas

corpus proceeding." Thus, petitioner was not required to obtain a COA before appealing from that order.

CONCLUSION

To the extent the judgment below requires a COA for an appeal from the order denying petitioner's motion for federally funded clemency counsel, it should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

FILED
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No. 07-8521

In the Supreme Court of the United States

EDWARD JEROME HARBISON, PETITIONER

v.

RICKY BELL, WARDEN

(CAPITAL CASE)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The Terrorist Death Penalty Enhancement Act of 2005, Pub. L. No. 109-177, Tit. II, § 222(a), 120 Stat. 231 (2006) (to be codified at 18 U.S.C. 3599 (2006)) (Section 3599), provides federal funding for counsel for indigent defendants and postconviction litigants in federal capital cases. The questions presented are:

1. Whether Section 3599 provides prisoners sentenced under state law the right to federally appointed and funded counsel to pursue clemency under state law.

2. Whether a district court's order denying a request for federally funded counsel under Section 3599 may be appealed without a certificate of appealability issued pursuant to 28 U.S.C. 2253(c).

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In the Supreme Court of the United States

No. 07-8521

EDWARD JEROME HARBISON, PETITIONER

v.

RICKY BELL, WARDEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the order of the Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

STATEMENT

1. Congress provides indigents with federally funded counsel and other services in certain federal death-penalty proceedings. See Terrorist Death Penalty Enhancement Act of 2005 (TDPEA), Pub. L. No. 109-177, Tit. II, § 222(a), 120 Stat. 231 (2006) (to be codified at 18 U.S.C. 3599 (2006)) (Section 3599).[1] Indigent federal defendants are eligible if they face one or more charges for which the maximum penalty is death. Indi-

[1] Section 3599 is reprinted in the appendix to this brief.

gent prisoners, federal or state, are also eligible if they seek federal postconviction relief from a death sentence under either 28 U.S.C. 2254 or 2255. Eligible indigents are entitled to federally funded counsel who meet specified qualifications, see Section 3599(b) and (c), and to "investigative, expert, or other services" when they are "reasonably necessary," Section 3599(f).

Appointed counsel continue to represent the defendant or prisoner "throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process." Section 3599(e). Counsel's representation also extends to "applications for stays of execution and other appropriate motions and procedures." *Ibid.* Relevant here, counsel "shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant." *Ibid.*

Section 3599 was originally enacted as part of the statute creating a new federal capital offense of drug-related homicide and accompanying sentencing procedures, and was originally codified at 21 U.S.C. 848(q)(4)-(10). Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7001(b), 102 Stat. 4393-4394. In 2006, Congress repealed the death penalty procedures in Title 21 and moved the statute providing for appointment of counsel, without substantive change, to its current location at 18 U.S.C. 3599. See TDPEA §§ 221(4), 222, 120 Stat. 231-232; see also H.R. Conf. Rep. No. 333, 109th Cong., 1st Sess. 102 (2005) (H.R. Conf. Rep.) (noting that the conference committee had added a provision to "transfer[] existing statutes from the death penalty procedures con-

tained in title 21 * * * to the death penalty procedures in title 18").

2. In 1983, in Chattanooga, Tennessee, petitioner bludgeoned Edith Russell to death when she surprised him burglarizing her house. Following a jury trial in a Tennessee state court, petitioner was convicted of first-degree murder, second-degree burglary, and grand larceny. He was sentenced to death as a result of his murder conviction. The Tennessee Supreme Court affirmed petitioner's convictions and death sentence. *State* v. *Harbison*, 704 S.W.2d 314, 315-316, cert. denied, 476 U.S. 1153 (1986).

Petitioner thereafter filed a petition for state post-conviction relief. After an evidentiary hearing, the state trial court denied the petition. The Tennessee Court of Criminal Appeals affirmed, *Harbison* v. *State*, No. 03C01-9204-CR-00125, 1996 WL 266114 (May 20, 1996), and the Tennessee Supreme Court denied discretionary review.

3. In February 1997, petitioner moved the United States District Court for the Eastern District of Tennessee to stay his execution and appoint counsel to represent him in filing a federal habeas petition, pursuant to the statute now codified as Section 3599. The motions were granted, and the district court appointed Federal Defender Services of East Tennessee, Inc. (Federal Defender Services) to represent petitioner. *Harbison* v. *Bell*, 408 F.3d 823, 827 (6th Cir. 2005), cert. denied, 547 U.S. 1101 (2006); see Pet. App. 15-16.

Through his appointed counsel, petitioner filed a federal habeas petition challenging his conviction and death sentence. The district court denied habeas relief. Petitioner obtained a certificate of appealability (COA) on three of his claims, but on review the Sixth Circuit af-

firmed the denial of his habeas petition. *Harbison*, 408 F.3d at 837. Petitioner unsuccessfully sought post-judgment relief from the denial of his first habeas petition or, in the alternative, permission to file a second or successive federal habeas petition. See Pet. App. 1-3. This Court denied his petitions for a writ of certiorari. 128 S. Ct. 1479, 1493 (2008).

The Tennessee Supreme Court set an execution date and appointed the state Office of the Post-Conviction Defender to represent petitioner in any final state-court proceedings. Pet. 3-4. The court clarified in a subsequent order, however, that the Post-Conviction Defender's representation does not extend to executive clemency. Pet. 4.

4. In December 2006, petitioner moved the federal district court to expand the appointment of counsel and permit Federal Defender Services to represent him in state clemency proceedings in the event that his efforts to obtain judicial relief should fail. Petitioner's appointed counsel submitted an affidavit averring that if petitioner were unsuccessful in obtaining judicial relief from his conviction or death sentence, he intended to seek clemency from the Governor and wished the assistance of counsel. Pet. App. 15-16. Petitioner asserted that the expanded appointment was authorized by Section 3599 and by 18 U.S.C. 3006A(a)(2)(B), which permits a district court to appoint "representation * * * for any [indigent] person who * * * is seeking relief under [28 U.S.C. 2254]." See Pet. App. 16 & n.6.

The district court denied the motion. Pet. App. 15-19. The court recognized that "there is a circuit split on whether [Section 3599], which authorizes the appointment of *federal* habeas corpus counsel, extends that appointment to *state* clemency proceedings." *Id.* at 16.

The court held, however, that the Sixth Circuit had effectively resolved the question "in a closely analogous situation." *Id.* at 17. The court of appeals had rejected an inmate's request for his federally funded counsel to assist him in seeking *state* postconviction relief, holding: "The two representations shall not mix. The state will be responsible for state proceedings, and the federal government will be responsible for federal proceedings." *Ibid.* (quoting *House* v. *Bell*, 332 F.3d 997, 999 (6th Cir. 2003) (en banc)). In the district court's view, the "'simple'" rule laid down in *House* plainly showed that the Sixth Circuit "would follow the same reasoning if asked to determine whether the statute provides for federally-appointed counsel during state clemency proceedings." *Ibid.*

5. Petitioner appealed. The court of appeals directed him to file an application for a COA, which he did. The appeal proceeded on those papers, *i.e.*, without separate merits briefing.

The court of appeals affirmed in a published opinion. Pet. App. 1-4. The court first observed that it was "not clear" that petitioner's appeal required a COA, and stated that if it reached the issue it "would follow the implied rule from [the Fifth Circuit] * * * that no COA was required." *Id.* at 4 (citing *Smith* v. *Dretke*, 422 F.3d 269, 288 (5th Cir. 2005)).

The court of appeals then held that its en banc decision in *House* foreclosed petitioner's interpretation of Section 3599, which "does not authorize federal compensation for legal representation in state matters." Pet. App. 4. The court therefore held that if petitioner were required to obtain a COA, it would deny one because circuit precedent was clear. The court concluded that it would both "[d]eny the motion for a COA for [Federal

Defender Services] to represent [petitioner] in state clemency proceedings" *and* "[a]ffirm the district court." *Ibid.*

6. Petitioner's execution by lethal injection was subsequently stayed when petitioner, represented by Federal Defender Services, challenged Tennessee's lethal-injection protocol in a Section 1983 action in another federal district court. *Harbison* v. *Little*, 511 F. Supp. 2d 872 (M.D. Tenn. 2007), appeal pending, No. 07-6225 (6th Cir. filed Oct. 11, 2007). Following this Court's decision in *Baze* v. *Rees*, 128 S. Ct. 1521 (2008), the Sixth Circuit set a briefing schedule but has left the stay in place.

DISCUSSION

Petitioner seeks review of two questions: (1) whether Section 3599 authorizes federal funding for counsel to pursue state clemency on behalf of a state capital defendant; and (2) whether a COA is required to appeal from the denial of federal funding under Section 3599. The court of appeals correctly held that federal funding is not available, and in our view, no COA was required to proceed with the appeal. Nevertheless, the decision of the court of appeals on the funding issue implicates a circuit split on a question that is worthy of this Court's review. The threshold question whether petitioner was required to obtain a COA does not implicate any direct conflict among the circuits, but resolving it would be a jurisdictional prerequisite to reaching the question of statutory interpretation on which there is a conflict. Because the funding issue warrants resolution by this Court, we believe that certiorari should be granted on both of the questions presented.

A. Certiorari Is Warranted To Resolve A Circuit Split Concerning Whether Federal Funding Is Authorized For State Clemency Counsel

In *In re Taylor*, 537 U.S. 1079 (2002), this Court denied review on the first question presented. Since then, the Tenth Circuit, sitting en banc, has rejected the holdings of several other courts of appeals that funding for state clemency counsel is not authorized. The Tenth Circuit's en banc decision has created an entrenched circuit split on that question, which therefore is ripe for resolution by this Court.

1. Three circuits have held that Section 3599 provides funding only for counsel in federal proceedings. The Sixth Circuit so held in *House* v. *Bell*, 332 F.3d 997 (2003) (en banc), as to collateral litigation in state court, noting that Section 3599 embodies the "simple" rule that "[t]he state will be responsible for state proceedings, and the federal government will be responsible for federal proceedings." *Id.* at 999. It applied that rule here to state clemency proceedings. The Fifth and Eleventh Circuits have likewise rejected requests for federal funding for representation in state clemency proceedings and in state postconviction proceedings. *King* v. *Moore*, 312 F.3d 1365, 1366-1368 (11th Cir.) (clemency), cert. denied, 537 U.S. 1069 (2002); *Clark* v. *Johnson*, 278 F.3d 459, 461-463 (5th Cir.) (same), cert. denied, 537 U.S. 1079 (2002); *Sterling* v. *Scott*, 57 F.3d 451, 458 (5th Cir. 1995) (state-court litigation), cert. denied, 516 U.S. 1050 (1996); *In re Lindsey*, 875 F.2d 1502, 1506 (11th Cir. 1989) (same).

The law in the Eighth Circuit is less clear. Under a prior version of the statute, which permitted courts to "fix the compensation to be paid to attorneys appointed

under this subsection * * * at such rates or amounts as the court determines to be reasonably necessary to carry out the [statute's] requirements," 21 U.S.C. 848(q)(10) (1988), the Eighth Circuit thought that Congress intended "to [e]nsure that indigent state petitioners receive 'reasonably necessary' competency and clemency services." *Hill* v. *Lockhart*, 992 F.2d 801, 803 (1993). But the court held that such services would not be "reasonably necessary," and thus would not be federally funded, unless "state law provide[d] no avenue to obtain compensation for these services"; the underlying federal habeas petition was "non-frivolous"; and "in most if not all cases," the request for funding was "made prior to performing the services." *Ibid.*[2]

In 1996, however, Congress amended the statute to eliminate the "reasonably necessary" phrase, on which the Eighth Circuit relied, from the provisions authorizing federal funding of counsel. Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 903(b), 110 Stat. 1318. "[I]nvestigative, expert, and other services" are still covered only if "reasonably necessary," but attorneys' appointment and compensation now do not turn on a finding of reasonable necessity. Section 3599(f) and (g)(1). In light of that change, it is unclear whether the Eighth Circuit would adhere to its analysis in *Hill*.[3]

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[2] The court also adopted the Eleventh Circuit's conclusion that federal funding is categorically unavailable for state postconviction proceedings. See *Hill*, 992 F.2d at 803 (citing *Lindsey*, 875 F.3d at 1506-1507).

[3] Given the uncertainty about *Hill*'s viability, the government had filed a brief in *In re Taylor* at the Court's invitation, suggesting that the petition be denied because of the absence of a square conflict at that time. U.S. Amicus Br. at 7-18, *In re Taylor*, *supra* (No. 01-1605).

2. In *Hain* v. *Mullin*, 436 F.3d 1168 (2006), the en banc Tenth Circuit broke ranks and held that any counsel appointed under Section 3599 to represent a state death row inmate in federal habeas corpus proceedings is "authorized by the statute to represent the[] client[] in state clemency proceedings and [is] entitled to compensation for clemency representation." *Id.* at 1170. The court declined to decide whether federal funding was available for state *judicial* proceedings. *Id.* at 1173 n.6. But it acknowledged that its interpretation created "a circuit split on the issue" of funding for state clemency proceedings. *Id.* at 1172.

Three judges dissented in an opinion by Judge Briscoe. The dissent focused on Section 3599 as a whole, noting that it was enacted as part of a statute creating a new federal capital offense and providing federally funded representation to federal defendants in capital cases. *Hain*, 463 F.3d at 1177. In the dissent's view, the statutory structure demonstrated that although Subsection (e) does not use the word "federal" to describe "pretrial proceedings," "sentencing," "motions for new trial," "post-conviction proceedings," or "clemency," for which federal funding is available, "all of the proceedings listed in [Subsection (e)] are federal proceedings." *Id.* at 1178. "[T]he majority of the proceedings expressly listed in [Subsection (e)] have no applicability at all to state capital prisoners," the dissent concluded, and Congress could not have intended for state prisoners to receive federally funded counsel in (for example) resentencings or even new trials in state court. *Ibid.*

As for the statute's provision in Subsection (e) that appointed counsel "shall also represent the defendant in * * * such proceedings for executive or other clemency as may be available"—which the majority thought must

refer to state clemency since federal clemency is "executive," see 436 F.3d at 1174—Judge Briscoe suggested that Congress "could reasonably have anticipated the availability of 'other' avenues for federal prisoners to obtain clemency." *Id.* at 1179; see *id.* at 1179-1180 (discussing the clemency boards used by Presidents Ford and Truman, as well as other possible avenues for seeking clemency besides directly from the President). By contrast, "had Congress intended to provide federal funding to state capital defendants in state clemency proceedings," it likely would not have done so "through a vague reference to 'other clemency.'" *Id.* at 1180.

The en banc decision in *Hain* creates a square conflict. Death row inmates in the six States of the Tenth Circuit (all of which have the death penalty) are currently entitled to federally funded lawyers to prepare and press their clemency applications. Inmates sentenced to death in the Fifth, Sixth, and Eleventh Circuits (where nine States have the death penalty) cannot receive federal funding for those lawyers. The issue is a recurring one that warrants this Court's review.[4]

3. On the merits, petitioner is incorrect in his contention (Pet. 13-14) that the statute "plainly authorizes" federal funding for representation in state clemency proceedings, or any other state proceedings. Indeed, the principle on which petitioner himself relies (Pet. 15-18)—that Congress's re-enactment of statutory lan-

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[4] The state wardens within the Tenth Circuit are unlikely to seek this Court's review—indeed, they may not have a live stake in whether an inmate receives *federal* funding for clemency counsel. See, *e.g.*, *Hill*, 992 F.3d at 803 n.3 (Arkansas Attorney General sided with the inmate's request for federally funded counsel); Br. in Opp. 5-6. The real party in interest would appear to be the United States, which must provide the funding.

guage presumptively ratifies the consensus judicial interpretation of the unchanged—offers him no support.

a. Petitioner's premise—that Congress intended to provide counsel for both state and federal proceedings—is refuted by Section 3599's text and structure. First, Section 3599 has no application until a defendant or habeas petitioner comes into federal court. State prisoners do not receive federal funding for state post-conviction proceedings before they file for federal habeas relief, and it would be incongruous to provide such federal funding for state litigation after federal proceedings have begun, or even ended.

Second, reading Section 3599 to authorize funding for state proceedings would provide incentives to circumvent the longstanding requirement that *all* claims presented in a federal habeas petition be properly exhausted. See *Rhines* v. *Weber*, 544 U.S. 269, 273-274 (2005). On petitioner's reading, an inmate who invokes federal habeas jurisdiction immediately becomes entitled to federally funded counsel who can promptly return to state court on the inmate's behalf, to exhaust any claims that had not previously been presented. Inmates would have a significant incentive to file mixed or unexhausted federal habeas petitions as soon as possible so that counsel will be appointed and begin working on exhausting. The federal habeas statutes—including the exhaustion requirement and the statute of limitations' tolling provision—encourage precisely the opposite practice: petitioning for relief in federal court should come only after thorough litigation in state court. See *id.* at 276-277; *Duncan* v. *Walker*, 533 U.S. 167, 180 (2001).

Third, Sections 3599(b) and (c) establish minimum qualifications for appointed counsel by reference to

practice in *federal* court. See Section 3599(b) (when counsel are appointed before judgment, "at least one attorney so appointed must have been admitted to practice in the court in which the prosecution is tried for not less than five years"); Section 3599(c) (when counsel are appointed after judgment, "at least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years"). There is no requirement that counsel appointed after judgment be admitted to practice in the State of conviction, which presumably would be necessary if Section 3599 anticipated that counsel would handle "all available post-conviction process" and "applications for stays of execution" in state court.

Petitioner, and the Tenth Circuit in *Hain*, suggest that the mere fact that Section 3599(e) does not use the word "federal" is dispositive as a matter of "plain language." Pet. 15; *Hain*, 436 F.3d at 1172. But "the meaning of statutory language, plain or not, depends on context." *Holloway* v. *United States*, 526 U.S. 1, 7 (1999) (quoting *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994), and *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991)). And the context here makes plain that the proceedings listed in Subsection (e) are federal ones. Indeed, the word "federal" does not appear in Subsection (a)(1), which affords "a defendant" the right to federally funded counsel in capital cases, but the statute's structure makes clear that this provision benefits only *federal* defendants—not every capital-murder defendant in the country.

b. The structure of Section 3599 also refutes the notion, advanced by the Tenth Circuit in *Hain*, that every defendant or petitioner who is appointed counsel Section 3599 *must* be entitled to counsel for each and

every proceeding listed in Subsection (e). Section 3599 provides for appointment of counsel for two entirely distinct categories of clients: defendants charged with a federal capital crime and prisoners pursuing federal postconviction relief from a capital conviction. The statute then provides, in Subsection (e), a list of the proceedings for which appointed counsel may receive federal funding. But because some clients are accused defendants not yet convicted, and others are seeking postconviction relief after trial and direct review are complete, some of the proceedings listed in Subsection (e) apply only to a subset of cases.

For example, in context, "pretrial proceedings," "trial," "sentencing," and "motions for new trial" can only refer to *federal* pre- and post-trial proceedings. Because in federal criminal cases defendants become eligible for counsel under Section 3599(a)(1) as soon as they are charged with a death-eligible crime, counsel appointed under that section frequently are called upon to represent clients at those pre- and post-trial stages. Proceedings such as "motions for new trial," moreover, simply have no application to habeas petitioners.

c. The reference in Subsection (e) to "executive or other clemency" does not undo this sensible reading of the statute. First, as Judge Briscoe explained in her *Hain* dissent, giving meaning to the phrase "or other" does not require the strained conclusion that Congress meant to sweep in *state* clemency proceedings. 436 F.3d at 1179. For example, the President has periodically enlisted the assistance of other officials in reviewing applications for clemency. *Ibid.* Congress could reasonably have used the distinction between "executive" and "other" clemency proceedings to distinguish between

relief granted by the President himself and proceedings before another entity.

Furthermore, Congress would not have placed such weight on the ambiguous two-word phrase "or other." The manifold expansion of the scope of the statute that would be occasioned by reading it to provide federal funding for state proceedings as well as federal would be the kind of "radical departure[] from past practice" that Congress would not attempt to accomplish with the two words "or other." *Jones* v. *United States*, 526 U.S. 227, 234 (1999); see *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 543 (1994); *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 693-694 (1983). That is so especially because of the potential friction with values of federalism that would result from federal courts' appointing lawyers to litigate in state court *or* before state executive officials, and supervising their representation according to federal standards. *King*, 312 F.3d at 1367-1368; *Clark*, 278 F.3d at 462; *Sterling*, 57 F.3d at 457-458; *Lindsey*, 875 F.2d at 1506-1507. See generally *United States* v. *Bass*, 404 U.S. 336, 349 (1971) (courts should not lightly infer an intent to alter the federal-state balance).

d. Petitioner contends (Pet. 15-16) that Congress's recent "re-codification, *verbatim*, of § 848(q)(8) at 18 U.S.C. § 3599(e)" supports his position. In fact the opposite is true. When Congress re-enacts a statute, it is presumed to be aware of the settled interpretation of the statute's language, and when it re-enacts the statute without change, it is presumed to have acquiesced in that settled interpretation. See, *e.g.*, *Keene Corp.* v. *United States*, 508 U.S. 200, 212-213 (1993); *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978). While petitioner relies on that principle, at the time the recodifying stat-

ute was written, *no* court of appeals had clearly adopted petitioner's position.

The legislation that recodified Section 848(q)(4)-(10) as Section 3599 was adopted by a House-Senate conference committee in December 2005. See H.R. Conf. Rep. at 1. At that time, the Tenth Circuit had not yet filed its en banc opinion in *Hain*. The only circuits to have taken a position on the existing language—the Fifth, Sixth, and Eleventh—had all held that it applies only to federal proceedings. The single appellate decision leaning in the other direction, the Eighth Circuit's decision in *Hill*, had turned on the "reasonably necessary" language that Congress later deleted from the statute in 1996. See p. 8, *supra*.[5] The Tenth Circuit's decision in *Hain* came only after the recodifying legislation had gone through conference committee, had its text finalized, and been adopted by the House. See 151 Cong. Rec. H11543-H11544 (daily ed. Dec. 14, 2005). The Senate adopted the conference report five weeks after *Hain*, 152 Cong. Rec. S1631-S1632 (daily ed. March 2, 2006), and the President signed the bill. Thus, at the time the legislation was being drafted, Congress would have understood that the courts of appeals had unanimously interpreted the statute to provide federal funding only for federal proceedings, but for the Eighth Circuit's *Hill* decision, which relied on language Congress had already removed. If the acquiescence principle is employed as a

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[5] A single federal district court had held that Section 848(q) required the appointment of counsel to investigate claims for presentation to (and exhaustion in) state courts. *Gordon* v. *Vasquez*, 859 F. Supp. 413, 417-418 (E.D. Cal. 1994). The Ninth Circuit held that the respondent state warden had no standing to challenge the order, and that the court's ruling therefore was insulated from review. *Calderon* v. *United States Dist. Court*, 107 F.3d 756, 761, cert. denied, 522 U.S. 907 (1997).

means of divining congressional intent, rather than mere formalism, then clearly post-drafting developments are entitled to little or no weight. Far from silently rejecting the pre-*Hain* consensus, Congress's actions are best understood as ratifying it.

B. Review Is Warranted On The Threshold Question Whether A Certificate Of Appealability Is Required

On the question whether petitioner required a certificate of appealability in order to appeal the district court's interpretation of Section 3599, no direct circuit conflict independently warrants this Court's review. The Court would be obliged to resolve that issue, however, before turning to the merits of the Section 3599 question, because satisfying the COA requirement is a condition of appellate jurisdiction in habeas cases. In the government's view, a COA is not required, but the Court should grant review on the COA issue because the underlying funding question warrants review.

1. The COA requirement is jurisdictional

The court of appeals did not definitively determine whether petitioner required a certificate of appealability (COA) to appeal the denial of his motion to expand the scope of his habeas counsel's appointment, because it concluded that petitioner's argument was not even persuasive enough to warrant a COA, let alone reversal. See Pet. App. 4. The court should have confronted the COA question, however, because the COA requirement, when it applies, is a "jurisdictional prerequisite" to taking an appeal in a habeas case. *Miller-El* v. *Cockrell*, 537 U.S. 322, 336 (2003) (explaining that a COA "is a jurisdictional prerequisite because the COA statute mandates that '[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken

to the court of appeals'") (quoting 28 U.S.C. 2253(c)(1)) (brackets in original). When a habeas petitioner's appeal must satisfy the standards for a COA, but does not, the correct disposition is dismissal for lack of appellate jurisdiction, not affirmance (which the court seemingly entered here). See *id.* at 336-337. Indeed, this Court has disapproved the practice of denying a COA by looking ahead to the merits of the petitioner's claim. See *ibid.* ("When a court of appeals sidesteps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction."); accord *id.* at 349 (Scalia, J., concurring).

Thus, because no judge or court has yet granted petitioner a COA,[6] for this Court to reach the merits of petitioner's first question presented, it would first have to decide whether a COA is required.

2. The COA issue does not present a square conflict

Petitioner asserts that the courts of appeals are split on the question whether a habeas petitioner must obtain a COA to appeal a district court's denial of funding under Section 3599. There is no developed conflict on that question, however.

As both petitioner and the court of appeals stated, the Fifth Circuit follows the rule that habeas petitioners need not obtain a COA in these circumstances. That holding traces back to the nonprecedential disposition in *Moreno* v. *Collins*, No. 94-50026, 1994 WL 24929 (5th Cir. Jan. 17, 1994), vacated mem. on other grounds, 512 U.S. 1252 (1994), which applied the similar but distinct

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[6] When a lower court has already granted a COA, this Court has reached the merits of a case without looking back at whether a COA was required. *E.g.*, *Gonzalez* v. *Crosby*, 545 U.S. 524, 535 n.7 (2005).

pre-AEDPA requirement to obtain a certificate of probable cause, see 28 U.S.C. 2253 (1994). Moreno had not filed a federal habeas petition, but sought appointment of counsel and a stay of execution in advance of such a filing. The district court denied that relief, and the court of appeals affirmed, noting in passing that Moreno was not required to obtain a certificate of probable cause because "no habeas proceedings have ever been filed in the instant case." 1994 WL 24929, at *1 & n.1. The Fifth Circuit has proceeded, without substantial analysis, to apply *Moreno*'s holding even in cases in which a habeas petition *has* been filed and the petitioner seeks permission for counsel to broaden their representation under Section 3599. *Barnard* v. *Collins*, 13 F.3d 871, 878 n.6 (5th Cir. 1994) (citing *Moreno*); *Sterling*, 57 F.3d at 454 (citing *Barnard*); *Hill* v. *Johnson*, 210 F.3d 481, 487 n.2 (5th Cir. 2000) (citing *Sterling*); *Smith* v. *Dretke*, 422 F.3d 269, 288 (5th Cir. 2005) (citing *Hill*).

The other cases petitioner cites, however, are inapposite, and none squarely requires a COA. First, the court of appeals in this case directed petitioner to file a motion for a COA and "[d]en[ied]" that motion, but never actually held that a COA is required. Pet. App. 4. And its judgment was to "[a]ffirm" the district court rather than to dismiss the appeal. *Ibid.*

Second, although the Eleventh Circuit once stated that a certificate of probable cause was not required, in that case, the habeas petitioner had been executed and his *attorneys* were appealing the court's rejection of their reimbursement vouchers. *Weeks* v. *Jones*, 100 F.3d 124, 127 n.6 (11th Cir. 1996) (citing *Sterling*, 57 F.3d at 454 n.3, and *Barnard*, 13 F.3d at 878 n.6). Holding that no certificate is required for an attorney to appeal in a collateral fee proceeding does *not* establish that

the same is true for an appeal by the petitioner "in a habeas corpus proceeding," 28 U.S.C. 2253(c)(1)(A).[7]

Third, the single decision that petitioner identifies as requiring a COA does not truly confront the question. In *Michael* v. *Horn*, 459 F.3d 411 (3d Cir. 2006), the habeas petitioner sought to dismiss his lawyers, and the district court agreed. The court granted a COA on the question whether dismissing the lawyers had violated current Section 3599; it did not address whether a COA is required at all, or why. *Id.* at 416-418.

3. Petitioner was not required to obtain a COA here

In the government's view, the COA requirement does not apply to petitioner's appeal. As relevant here, the COA requirement applies to "the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court." 28 U.S.C. 2253(c)(1)(A). Petitioner's motion for federally funded clemency counsel is not substantively part of a "habeas corpus proceeding."[8]

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[7] Several cases have arisen in that posture. See, *e.g.*, *Hain*, 436 F.3d at 1171; *Hill*, 992 F.2d at 802.

[8] The COA requirement otherwise would be applicable: the district court's order denying petitioner federally funded clemency counsel is a "final" one, because it leaves no matters pending and is appealable immediately. And petitioner is in custody pursuant to the judgment of a state court.

Habeas petitioners have occasionally suggested that the phrase "*the* final order" means that only appeals from the one ultimate, dispositive order resolving a habeas proceeding are subject to the COA requirement. See, *e.g.*, *Gonzalez* v. *Secretary for the Dep't of Corr.*, 366 F.3d 1253, 1298-1301 (11th Cir. 2004) (en banc) (Tjoflat, J., specially concurring in part and dissenting in part), aff'd on other grounds *sub nom. Gonzalez* v. *Crosby*, 545 U.S. 524 (2005). The courts of appeals, virtually unanimously, have rejected that argument in other contexts. Nearly every circuit requires habeas petitioners and Section 2255

A habeas corpus proceeding, for purposes of the COA statute, is primarily one in which the petitioner seeks to challenge his confinement based on an alleged violation of the Constitution, laws, or treaties of the United States. 28 U.S.C. 2241(c)(3); cf. *Wilkinson* v. *Dotson*, 544 U.S. 74, 81 (2005) (stating that "'core' habeas corpus relief" includes "requests [for] present or future release"). Orders of the district court dealing with the merits of the federal claim or with procedural obstacles to granting relief are "final order[s] in a habeas corpus proceeding," for which a COA is required. Cf., *e.g.*, *Slack* v. *McDaniel*, 529 U.S. 473, 484-485 (2000) (applying the COA requirement to procedural orders).

Requests for clemency counsel, by contrast, do not involve the pursuit of any federal legal challenge to the petitioner's conviction or death sentence. Indeed, there is no constitutional right either to clemency itself or to counsel to pursue it. Although the goal of clemency is relief from the conviction or sentence, that relief comes on discretionary rather than legal grounds. It would be incongruous, therefore, to characterize a ruling on such a request as an "order in a habeas corpus proceeding."

A related incongruity comes from the COA requirement itself. To obtain a COA, a petitioner must make a "substantial showing of the denial of a constitutional

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movants to obtain a COA when they seek to appeal denial of a postjudgment motion. *Gonzalez*, 545 U.S. at 535 n.7 (collecting cases); *West* v. *Schneiter*, 485 F.3d 393, 394 (7th Cir. 2007) (COA required to appeal denial of motion for relief from judgment under Fed. R. Civ. P. 60(b)); *United States* v. *Rinaldi*, 447 F.3d 192, 195 (3d Cir.) (COA required to appeal denial of motion to reopen the time to appeal under Fed. R. App. P. 4(a)(6)), cert. denied, 127 S. Ct. 300 (2006). But cf. *Ochoa Canales* v. *Quarterman*, 507 F.3d 884, 887-888 (5th Cir. 2007) (explaining that in some circumstances Rule 60(b) movants may appeal without a COA), cert. denied, 128 S. Ct. 1697 (2008).

right." 28 U.S.C. 2253(c)(2). This is so even if the district court rules on procedural grounds. *Slack*, 529 U.S. at 484-485. Applying that standard to claims for clemency counsel would be difficult. Even assuming a capital petitioner could claim procedural constitutional violations in clemency proceedings, cf. *Ohio Adult Parole Auth.* v. *Woodard*, 523 U.S. 272 (1998), requests for appointment of federally funded counsel will in some cases (as here) occur before the clemency process has even occurred. And if federal law provided such a right of paid clemency counsel, seeking appointment in advance of representation would be a logical time to make the application. At that point, however, before any clemency proceedings have taken place, it would be implausible to suggest that a defendant (or his counsel) could make a "substantial showing of the denial of a constitutional right." That incompatibility of the COA standard with the claimed right suggests that the COA requirement does not apply to appeals from denial of the alleged entitlement to federally funded counsel to pursue state clemency.

Furthermore, the regulation of federally funded capital defense counsel may occur entirely outside the habeas corpus proceeding. Reimbursement of counsel formerly was handled ex parte, see 21 U.S.C. 848(q)(9) and (10) (1994), and even now counsel may pursue fees in their own name, potentially even under their own docket numbers, in some cases after their clients have been executed. See, *e.g.*, *Hain*, 436 F.3d at 1171; *Clark*, 278 F.3d at 460.

Accordingly, although in the government's view the COA issue must be decided before resolving the merits, the presence of the COA issue in this case is not a vehicle problem that will likely preclude reaching the merits.

Furthermore, even if the Court holds that petitioner was required to obtain a COA, it might still choose to opine on the substantive question of Section 3599's proper interpretation while applying the COA standard. See, *e.g.*, *Tennard* v. *Dretke*, 542 U.S. 274, 287-289 (2004) (resolving merits question in deciding whether a COA should have issued). Therefore, because the underlying issue warrants resolution, the Court should grant review on the COA question as well.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

Section 222(a) of the Terrorist Death Penalty Enhancement Act of 2005, Pub. L. No. 109-177, Tit. II, 120 Stat. 231 (2006) (to be codified at 18 U.S.C. 3599 (2006)), provides in relevant part:

Counsel for financially unable defendants

(a)(1) Notwithstanding any other provision of law to the contrary, in every criminal action in which a defendant is charged with a crime which may be punishable by death, a defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services at any time either—

(A) before judgment; or

(B) after the entry of a judgment imposing a sentence of death but before the execution of that judgment;

shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f).

(2) In any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f).

(b) If the appointment is made before judgment, at least one attorney so appointed must have been admit-

ted to practice in the court in which the prosecution is to be tried for not less than five years, and must have had not less than three years experience in the actual trial of felony prosecutions in that court.

(c) If the appointment is made after judgment, at least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases.

(d) With respect to subsections (b) and (c), the court, for good cause, may appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation.

(e) Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

(f) Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues re-

lating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor under subsection (g). No ex parte proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made concerning the need for confidentiality. Any such proceeding, communication, or request shall be transcribed and made a part of the record available for appellate review.

(g)(1) Compensation shall be paid to attorneys appointed under this subsection at a rate of not more than $125 per hour for in-court and out-of-court time. The Judicial Conference is authorized to raise the maximum for hourly payment specified in the paragraph up to the aggregate of the overall average percentages of the adjustments in the rates of pay for the General Schedule made pursuant to section 5305 of title 5 on or after such date. After the rates are raised under the preceding sentence, such hourly range may be raised at intervals of not less than one year, up to the aggregate of the overall average percentages of such adjustments made since the last raise under this paragraph.

(2) Fees and expenses paid for investigative, expert, and other reasonably necessary services authorized under subsection (f) shall not exceed $7,500 in any case, unless payment in excess of that limit is certified by the court, or by the United States magistrate judge, if the services were rendered in connection with the case disposed of entirely before such magistrate judge, as necessary to provide fair compensation for services of an unusual character or duration, and the amount of the excess payment is approved by the chief judge of the cir-

cuit. The chief judge of the circuit may delegate such approval authority to an active circuit judge.

(3) The amounts paid under this paragraph for services in any case shall be disclosed to the public, after the disposition of the petition.

AMICUS CURIAE BRIEF

No. 07-8521

In the Supreme Court of the United States

EDWARD JEROME HARBISON, PETITIONER

v.

RICKY BELL, WARDEN

(CAPITAL CASE)

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING THE JUDGMENT BELOW

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QUESTIONS PRESENTED

Section 3599 of Title 18, United States Code, provides federal funding for counsel for indigent defendants and postconviction litigants in federal proceedings involving a death sentence. The questions presented are:

1. Whether a district court's order denying a request for federally funded counsel under Section 3599 may be appealed without a certificate of appealability issued pursuant to 28 U.S.C. 2253(c).

2. Whether Section 3599 provides prisoners sentenced under state law the right to federally appointed and funded counsel to pursue clemency under state law.

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In the Supreme Court of the United States

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EDWARD JEROME HARBISON, PETITIONER

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING THE JUDGMENT BELOW

INTEREST OF THE UNITED STATES

The principal question presented is whether state prisoners who have been sentenced to death are entitled to federally funded counsel to pursue clemency. Such federal funding would be drawn from the same congressional appropriation that pays for representation for federal capital defendants prosecuted by the United States. The Attorney General also reviews the adequacy of state funding for capital defendants' postconviction counsel, see 28 U.S.C. 2265, and through federal grants implements the federal policy of encouraging States to provide compensation, resources, and other support to counsel for indigent capital defendants, see 42 U.S.C. 14163-14163h (Supp. V 2005).

This case also presents the threshold question whether petitioner was required to obtain a certificate of appealability (COA) under 28 U.S.C. 2253(c), which governs appeals in federal postconviction proceedings as well. The United States has participated in other cases involving the interpretation of Section 2253(c). See *Slack* v. *McDaniel*, 529 U.S. 473 (2000); *Hohn* v. *United States*, 524 U.S. 236 (1998).

The United States accordingly has a substantial interest in the resolution of both questions. At the Court's invitation, the Solicitor General filed a brief expressing the views of the United States on whether certiorari should be granted.

STATEMENT

1. Congress provides indigents with federally funded counsel and other services in certain federal proceedings involving a death sentence. See 18 U.S.C. 3599. To qualify, indigents must fall into one of two categories, which the statute enumerates separately. First, indigent defendants are eligible if they face one or more federal charges for which the maximum penalty is death. 18 U.S.C. 3599(a)(1). Second, indigent prisoners seeking postconviction relief in federal court under 28 U.S.C. 2254 or 2255 are eligible if they are "seeking to vacate or set aside a death sentence." 18 U.S.C. 3599(a)(2). Under the latter provision, state prisoners sentenced to death become eligible for federally funded counsel when they challenge their sentences in federal court under 28 U.S.C. 2254.

Eligible indigents are entitled to federally funded counsel who meet specified qualifications. See 18 U.S.C. 3599(b) and (c). They may also receive funding for "in-

vestigative, expert, or other services" when those services are "reasonably necessary." 18 U.S.C. 3599(f).

Appointed counsel continue to represent the defendant or prisoner "throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process." 18 U.S.C. 3599(e). Counsel's representation also extends to "applications for stays of execution and other appropriate motions and procedures." *Ibid.* Relevant here, counsel "shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant." *Ibid.*

Section 3599 was originally enacted as part of the statute creating a new federal capital offense of drug-related homicide and specifying sentencing procedures, and it was originally codified at 21 U.S.C. 848(q)(4)-(10) (1988). Anti-Drug Abuse Act of 1988 (1988 Act), § 7001(b), 102 Stat. 4388-4395, Pub. L. No. 100-690. In 2006, Congress determined that the Federal Death Penalty Act of 1994 (FDPA), 18 U.S.C. 3591 *et seq.*, would provide the exclusive framework for imposing a federal death sentence. Congress accordingly repealed the death-penalty procedures in Title 21 and moved the statute providing for appointment of counsel, without substantive change, to its current location at 18 U.S.C. 3599, in the same chapter as the FDPA. See Terrorist Death Penalty Enhancement Act of 2005, Pub. L. No. 109-177, Tit. II, §§ 221(4), 222, 120 Stat. 231-232 (2006).

2. In 1983, in Chattanooga, Tennessee, petitioner bludgeoned Edith Russell to death when she surprised him while he was burglarizing her house. Following a

jury trial in a Tennessee state court, petitioner was convicted of first-degree murder, second-degree burglary, and grand larceny. He was sentenced to death as a result of his murder conviction. The Tennessee Supreme Court affirmed petitioner's convictions and death sentence. *State* v. *Harbison*, 704 S.W.2d 314, 315-316, cert. denied, 476 U.S. 1153 (1986).

Petitioner thereafter filed a petition for state post-conviction relief through new counsel. After an evidentiary hearing, the state trial court denied the petition. The Tennessee Court of Criminal Appeals affirmed, *Harbison* v. *State*, No. 03C01-9204-CR-00125, 1996 WL 266114 (May 20, 1996), and the Tennessee Supreme Court denied discretionary review.

3. In February 1997, petitioner moved the United States District Court for the Eastern District of Tennessee to stay his execution and appoint counsel to represent him in filing a federal habeas petition, pursuant to the statute now codified as Section 3599. The motions were granted, and the district court appointed Federal Defender Services of East Tennessee, Inc. (Federal Defender Services) to represent petitioner. *Harbison* v. *Bell*, 408 F.3d 823, 827 (6th Cir. 2005), cert. denied, 547 U.S. 1101 (2006); see Pet. Br. App. 27a.

Through Federal Defender Services, petitioner filed a federal habeas petition challenging his conviction and death sentence. The district court denied habeas relief. Petitioner obtained a certificate of appealability (COA) on three claims, but on review the Sixth Circuit affirmed the denial of his habeas petition. *Harbison*, 408 F.3d at 837. Petitioner unsuccessfully sought postjudgment relief from the denial of his first habeas petition or, in the alternative, permission to file a second or successive federal habeas petition. See Pet. Br. App. 6a-11a, 12a.

This Court denied his petitions for a writ of certiorari. 128 S. Ct. 1479 (2008).

The Tennessee Supreme Court set an execution date and appointed the state Office of the Post-Conviction Defender to represent petitioner in any final state-court proceedings. Pet. Br. 8. Tennessee authorizes the Post-Conviction Defender to represent capital inmates in executive clemency proceedings as well. Tenn. Code Ann. § 40-30-206(e) (2006). The Tennessee Supreme Court has since clarified, however, that the Post-Conviction Defender has the discretion to decide whether to take on a clemency representation and that the court will not order the Defender to do so in a particular case. *State* v. *Johnson*, No. M1987-00072-SC-DPE-DD, 2006 Tenn. LEXIS 1236 (Oct. 6, 2006). The Post-Conviction Defender does not wish to represent petitioner in clemency, citing resource constraints. Mot. for Leave to Expand Appointment Order, 1:97-CV-52 Docket entry No. 156, Attach. F (E.D. Tenn. Dec. 13, 2006); see Pet. Br. App. 27a.

4. In December 2006, petitioner moved the federal district court to expand the appointment of counsel and permit Federal Defender Services to represent him in state clemency proceedings in the event that his efforts to obtain judicial relief should fail. Petitioner asserted that the expanded appointment was authorized by Section 3599 and by 18 U.S.C. 3006A(a)(2)(B), which permits a district court to appoint "representation * * * for any [indigent] person who * * * is seeking relief under [28 U.S.C. 2254]." See Pet. Br. App. 28a & n.6.

The district court denied the motion. Pet. Br. App. 26a-31a. The question "whether [Section 3599], which authorizes the appointment of *federal* habeas corpus counsel, extends that appointment to *state* clemency pro-

ceedings," the district court stated, was resolved by the Sixth Circuit's holding "in a closely analogous situation." *Id.* at 28a. The court explained that the Sixth Circuit, sitting en banc, had unanimously rejected a prisoner's request for his federally funded counsel to assist him in seeking *state* postconviction relief, holding: "The two representations shall not mix. The state will be responsible for state proceedings, and the federal government will be responsible for federal proceedings." *Id.* at 29a (quoting *House* v. *Bell*, 332 F.3d 997, 999 (6th Cir. 2003) (en banc)). In the district court's view, that "'simple'" rule showed that the Sixth Circuit "would follow the same reasoning if asked to determine whether the statute provides for federally-appointed counsel during state clemency proceedings." *Ibid.* (quoting *House*, 332 F.3d at 999).

5. Petitioner appealed. The court of appeals directed him to file an application for a COA, which he did. The appeal proceeded on those papers, *i.e.*, without separate merits briefing.

The court of appeals affirmed. Pet. Br. App. 5a-14a. The court first observed that it was "not clear" that petitioner's appeal required a COA and stated that, if it reached the issue, it would conclude "that no COA was required." *Id.* at 11a.

The court of appeals then held that its en banc decision in *House* foreclosed petitioner's interpretation of Section 3599, which "does not authorize federal compensation for legal representation in state matters." Pet. Br. App. 11a. The court therefore held that if petitioner were required to obtain a COA, it would deny one because circuit precedent was clear. See *ibid.* The court concluded that it would both "[d]eny the motion for a COA for [Federal Defender Services] to represent [peti-

tioner] in state clemency proceedings" and "[a]ffirm the district court." *Id.* at 12a. Judge Clay dissented on other issues. *Id.* at 12a-14a.

6. Petitioner's execution was subsequently enjoined when petitioner, represented by Federal Defender Services, challenged Tennessee's lethal-injection protocol in a Section 1983 action in another court. *Harbison* v. *Little*, 511 F. Supp. 2d 872 (M.D. Tenn. 2007), appeal pending, No. 07-6225 (6th Cir. filed Oct. 11, 2007). The injunction remains in place while the Sixth Circuit entertains briefing on the impact of *Baze* v. *Rees*, 128 S. Ct. 1520 (2008).

SUMMARY OF ARGUMENT

I. A COA is unnecessary for petitioner to appeal the denial of funding for state clemency counsel under 18 U.S.C. 3599. A federal district court's order concerning the scope of appointed counsel's representation outside the confines of federal habeas corpus is not a "final order in a habeas corpus proceeding," 28 U.S.C. 2253(c)(1)(A), and that order therefore may be appealed without a COA.

II. Section 3599 does not authorize federal funds for indigent state capital defendants seeking state clemency. Section 3599 provides funds for counsel for federal defendants facing a capital charge or prisoners actually sentenced to death and seeking postconviction relief in federal court. The entire structure of the statute focuses on federal proceedings, from the requirement that attorneys be admitted to practice in federal court to the types of proceedings in which attorneys are authorized to participate.

Petitioner seeks to expand the scope of Section 3599 to cover state proceedings as well. In his view, once a

state prisoner comes to federal court seeking relief from his death sentence, his federally funded counsel must continue to represent him in state proceedings as well—here, proceedings before the Governor of Tennessee seeking executive clemency. That position is unsupported by the text and structure of Section 3599, contradicts the legislative history, and would create needless friction between federal habeas corpus and a subset of state capital proceedings.

Petitioner's reading would likely compel federal courts to approve funding not just for clemency counsel, but for counsel in *all* state proceedings that follow a federal habeas petition. Congress did not intend that result. Contrary to petitioner's view, the omission of the word "federal" to describe the proceedings funded by Section 3599(e) does not mean that Congress intended to fund counsel in state proceedings that follow federal habeas. Rather, it reflects the fact that the structure of the statute has already made clear that federal funding is intended only for federal proceedings.

Petitioner contends that he is entitled to receive funding for *all* of the proceedings listed in Section 3599(e), and that because "clemency" proceedings are listed, he must be entitled to funding for *state* clemency proceedings because that is the only form of clemency open to him as a Tennessee prisoner. But Section 3599(e)—which was written principally for federal defendants on direct review—underwrites counsel only for particular federal proceedings that are "available" to particular defendants. State prisoners who cannot receive federal clemency therefore cannot receive federal funding for clemency proceedings.

Petitioner's final argument is that "executive or other clemency" cannot be limited to proceedings on the

federal level because only the States have "other clemency." But that phrase cannot bear the weight petitioner places upon it: Congress more likely meant to include clemency proceedings not conducted by Executive Branch officials, such as the clemency boards, made up of private citizens, that some previous Presidents have used to assist in the clemency process.

If further confirmation is necessary to show that Section 3599 is limited to federal proceedings, it comes from Congress's ratification of the consensus position in the federal courts of appeals when it recodified the counsel-funding provision in 2006. At the time Congress finalized the relevant text of the recodifying statute, three courts of appeals agreed that the provision applied only to federal proceedings, and none had definitively held otherwise

Finally, Congress's decision to limit federally funded counsel to federal proceedings is sensible. Federal habeas proceedings, unlike state clemency proceedings, are the primary forum for vindication of federal constitutional rights. Congress could (and did) sensibly decide not to fund counsel for the inherently discretionary process of state clemency, which predominantly involves subjective considerations unrelated to federal rights. While counsel may play a useful role in this process, as Congress has recognized by providing clemency counsel to indigent federal defendants, nothing suggests that Congress has a unique role to play in this area. Moreover, Congress could have reasonably concluded that funding lawyers with federal tax monies to appear before state tribunals for the purpose of upsetting state convictions would present unique federalism concerns.

ARGUMENT

SECTION 3599 AUTHORIZES FEDERAL FUNDING ONLY FOR COUNSEL IN FEDERAL PROCEEDINGS, AND DOES NOT EXTEND TO STATE PROCEEDINGS

The court of appeals' judgment is correct. First, no COA is required for petitioner to pursue an appeal seeking counsel fees under Section 3599. Second, Section 3599 is limited to federal proceedings and thus does not afford funding for counsel in state clemency proceedings.

I. THE COURT OF APPEALS PROPERLY EXERCISED APPELLATE JURISDICTION WITHOUT GRANTING A COA

As set out in the government's brief at the petition stage, the court of appeals should have definitively determined whether petitioner required a COA to appeal the denial of his motion to expand the scope of his habeas counsel's appointment, because the COA requirement (when it applies) is a "jurisdictional prerequisite" to taking an appeal in a habeas case. *Miller-El* v. *Cockrell*, 537 U.S. 322, 336 (2003). The court of appeals' failure to resolve that threshold issue, however, does not affect this Court's review of the merits, because petitioner was not required to obtain a COA.

As relevant here, the COA requirement applies to "the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court." 28 U.S.C. 2253(c)(1)(A). The district court's order denying petitioner federally funded clemency counsel is a "final" one, because it leaves no matters pending and is appealable immediately.[1] And peti-

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[1] Habeas petitioners have occasionally suggested that no COA is required to appeal from some final orders, such as those denying a post-

tioner is in custody pursuant to the judgment of a state court. But petitioner's motion for federally funded clemency counsel is not substantively part of a "habeas corpus proceeding."

A habeas corpus proceeding, for purposes of the COA statute, is primarily one in which the petitioner seeks to challenge his confinement based on an alleged violation of the Constitution, laws, or treaties of the United States. 28 U.S.C. 2241(c)(3); cf. *Wilkinson* v. *Dotson*, 544 U.S. 74, 81 (2005) (stating that "'core' habeas corpus relief" includes "requests [for] present or future release"). Orders of the district court resolving the merits of the federal claim (on procedural or substantive grounds) are "final order[s] in a habeas corpus proceeding," for which a COA is required. Cf., *e.g.*, *Slack* v. *McDaniel*, 529 U.S. 473, 484-485 (2000) (applying the COA requirement to procedural orders).

Requests for clemency counsel, by contrast, do not involve the pursuit of any federal legal challenge to the petitioner's conviction or death sentence. Cf. *Gonzalez* v. *Crosby*, 545 U.S. 524, 530, 533 (2005) (the term "habeas corpus application" in 28 U.S.C. 2244(b) does not cover a postjudgment motion unless that motion contains a federal "claim" for relief). Reimbursement of counsel formerly was handled ex parte, see 21 U.S.C. 848(q)(9) and (10) (1994), and, even now, counsel may pursue fees in their own names, potentially even under a separate docket number, in some cases after their cli-

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judgment motion under Rule 60(b) of the Federal Rules of Civil Procedure, on the theory that the phrase "*the* final order" in Section 2253(c)(1)(A) covers only appeals from the one ultimate, dispositive order resolving a habeas proceeding. Petitioner does not make that argument here, and it is not correct, as the courts of appeals have broadly recognized. See U.S. Cert. Amicus Br. 19 n.8.

ents have been executed. See, *e.g.*, *Hain* v. *Mullin*, 436 F.3d 1168, 1171 (10th Cir. 2006) (en banc); *Clark* v. *Johnson*, 278 F.3d 459, 460 (5th Cir.), cert. denied, 537 U.S. 1079 (2002). See also *McFarland* v. *Scott*, 512 U.S. 849 (1994) (holding that counsel may be appointed under what is now Section 3599 before a habeas corpus proceeding is actually commenced).

Indeed, the statutory standard for granting COAs—"a substantial showing of the denial of a constitutional right," 28 U.S.C. 2253(c)(2)—would be difficult to apply to a request for clemency counsel. Although the goal of clemency is relief from the conviction or sentence, that relief comes on discretionary rather than legal grounds. See *Herrera* v. *Collins*, 506 U.S. 390, 413 (1993) ("A pardon is an act of grace.") (quoting *United States* v. *Wilson*, 32 U.S. (7 Pet.) 150, 160 (1833) (Marshall, C.J.)). Neither a clemency application nor a request for counsel to pursue clemency implicates a constitutional right. And although the *handling* of a clemency application may implicate procedural due process rights, see *Ohio Adult Parole Auth.* v. *Woodard*, 523 U.S. 272 (1998), any claim of constitutional violation would be brought only after the clemency process had begun and would be asserted under 42 U.S.C. 1983, not in a habeas corpus proceeding. See 523 U.S. at 277.

II. THE COURT OF APPEALS CORRECTLY DENIED FUNDING FOR STATE CLEMENCY COUNSEL

Petitioner invokes Section 3599 as a means to pay for counsel in post-litigation state clemency proceedings. But nothing in Congress's design for Section 3599 indicates an intention to pay for counsel in state proceedings. As a part of the first federal death-penalty statute enacted under this Court's modern capital-sentencing

jurisprudence, Section 3599 focuses primarily on the needs of federal defendants. The statute then makes similar resources available to state death-row inmates, but *only* in challenging their capital sentences in federal court, on federal grounds, pursuant to Section 2254, the federal habeas statute. Section 3599 therefore does not provide state prisoners with funding for state motions for a new trial, state applications for stay of execution, state retrials, or state clemency proceedings.

A. Section 3599's Text And Structure Focus Entirely On Federal Proceedings

The provision of Section 3599 at issue here is Subsection (e), which sets out the scope of federally funded attorney representation for eligible indigents. Petitioner's central premise is that Subsection (e) must permit state prisoners to receive federally funded counsel for state clemency proceedings, because qualifying state prisoners must be entitled to receive every service listed in Subsection (e) and state prisoners cannot receive federal clemency. But petitioner's premise is flawed. Properly understood in light of the rest of Section 3599, Subsection (e) authorizes federally funded counsel to conduct only federal proceedings, and as a result some of the services listed in Subsection (e) apply only to federal defendants and Section 2255 movants.[2]

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[2] Petitioner is wrong in his assertions that "[t]he only proceedings that may be brought under Section 2254 are those instituted by *state* prisoners," to whom federal executive clemency is useless. Pet. Br. 21; see Pet. Br. 22. In fact, some Section 2254 petitioners *are* eligible for clemency from the President. Prisoners in U.S. territories may seek Section 2254 relief. See, *e.g.*, *White* v. *Klitzkie*, 281 F.3d 920, 923 n.3 (9th Cir. 2002); see also *Maddox* v. *Elzie*, 238 F.3d 437, 442 (D.C. Cir.) ("[T]he question whether a [District of Columbia] prisoner should be treated as a State prisoner for purposes of § 2254 is an open question

1. Section 3599(a) makes two different groups of indigents eligible for federal funding: federal defendants, who qualify under Subsection (a)(1), and federal and state postconviction litigants, who qualify under Subsection (a)(2). The services that appointed counsel provide are enumerated in Subsection (e). The latter provision is not divided into paragraphs corresponding to federal defendants and postconviction litigants; rather, it contains a single list of services. Petitioner contends (Br. 21-22) that he is entitled to clemency counsel simply because clemency proceedings are on that list. The context, however, makes clear that not every listed service applies to both categories of indigent clients.

Rather, as Subsection (e) emphasizes repeatedly, appointed counsel are to perform only those listed services that are "available" to the particular defendant or postconviction litigant. See 18 U.S.C. 3599(e) ("[E]ach attorney so appointed shall represent the defendant throughout every subsequent stage of *available* judicial proceedings, * * * and all *available* post-conviction process, together with * * * *appropriate* motions and procedures, and * * * such competency proceedings

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in this circuit."), cert. denied, 534 U.S. 836 (2001). The President's pardon power extends to offenses under territorial and D.C. law (although today the President generally allows territorial governors to exercise their concurrent pardon power, see 28 C.F.R. 1.4). Indeed, several Presidents have commuted territorial death sentences, see, *e.g.*, *Biddle* v. *Perovich*, 274 U.S. 480, 485, 487 (1927) (detailing President Taft's commutation of a death sentence imposed under the Criminal Code of the Territory of Alaska), although no territory currently has the death penalty. Thus, while state prisoners like petitioner cannot receive federal clemency, that will not necessarily always be true of Section 2254 petitioners.

and proceedings for executive or other clemency as may be *available* to the defendant.") (emphases added).

For instance, "pretrial proceedings," "trial," and "sentencing" are most naturally read to apply only to a federal criminal defendant who receives counsel before trial. Those stages are not "available judicial proceedings" to postconviction litigants. Similarly, although a state prisoner might wish to file "motions for new trial" in state court, the way the term appears in context—between "sentencing" and "appeal"—shows that it refers to motions for new trial filed in the ordinary sequence of events, *i.e.*, before direct appellate review. That understanding naturally limits these filings to federal court. Because state prisoners should already have completed these phases when they become eligible for federal habeas review and, as a result, for federally funded counsel, those prisoners logically are not intended to receive federal funding for state-court filings—even if those filings could be given the same name as one of the pleadings set out in Section 3599(e) (such as a "motion for new trial" or "other appropriate motions").

Petitioner suggests (Br. 25) that the mere fact that Section 3599(e) does not use the word "federal" is dispositive as a matter of "plain meaning." But "the meaning of statutory language, plain or not, depends on context." *Holloway* v. *United States*, 526 U.S. 1, 7 (1999) (quoting *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994), and *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991)). And the context here makes plain that the proceedings listed in Subsection (e) are federal ones. Indeed, the word "federal" does not appear in Subsection (a)(1), which affords "a defendant" the right to federally funded counsel in capital cases, but the statute's structure makes clear that this provision benefits only

federal defendants—not every capital-murder defendant in the country.

2. The provisions governing appointed counsel's qualifications confirm the inference that only federal proceedings are covered. Section 3599 generally requires that appointed counsel be admitted to practice in the appropriate *federal* court—the district court for counsel appointed before judgment, the court of appeals for counsel appointed afterward. 18 U.S.C. 3599(b) and (c). There is no requirement that counsel for a state prisoner be admitted to practice in that State, indicating that Section 3599 does not contemplate funding proceedings before state tribunals that would require such a bar admission. Cf. Fla. Stat. Ann. § 27.40(4) (West Supp. 2008) (court-appointed counsel, which include clemency counsel, must be Florida Bar members).[3]

As the Eleventh Circuit has noted, petitioner's reading of the statute would "seem to entitle habeas petitioners—if successful in having their state convictions vacated in federal court—to federally funded counsel for their resulting new state trial, state appeal, and state habeas proceedings." *King* v. *Moore*, 312 F.3d 1365, 1367, cert. denied, 537 U.S. 1069 (2002). The statutory qualifications, which focus only on ability to practice in federal court, therefore cut against petitioner's reading. An appellate lawyer who wins a federal habeas appeal may well lack the necessary bar admission or courtroom skills to represent the client at a new trial in state court.

3. Similarly, reading Section 3599 together with Section 2254 (the habeas corpus provision under which a

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[3] Nor is there any provision for the federal appointment to override the otherwise applicable bar membership rules. Cf. 28 U.S.C. 517 (permitting the Attorney General to direct any officer of the Department of Justice to represent the United States in any federal or state court).

state prisoner must proceed in order to secure counsel under the federal statute) demonstrates that Congress would not have contemplated federal funding for *state* "motions for new trial, appeals, * * * post-conviction process, * * * applications for stays of execution [or] other appropriate motions." Section 2254(b)(1) codifies the longstanding requirement that *all* claims presented in a federal habeas petition be properly exhausted. See generally *Rhines* v. *Weber*, 544 U.S. 269, 273-274 (2005). On petitioner's reading, a prisoner who invokes federal habeas jurisdiction immediately becomes entitled to federally funded counsel who can promptly return to state court on the prisoner's behalf, to exhaust any claims that had not previously been presented. Prisoners would have a significant incentive to file mixed or unexhausted federal habeas petitions, because the federally appointed counsel would promptly seek a stay and return to state court to begin exhausting. See, *e.g.*, *House* v. *Bell*, 332 F.3d 997, 998 (6th Cir. 2003) (en banc) (Federal Defender Services sought funding to pursue new claims in state court while federal habeas appeal was pending); *Sterling* v. *Scott*, 57 F.3d 451, 453 (5th Cir. 1995) (federally appointed counsel filed 34 new, unexhausted claims for relief and sought federal funding to exhaust them in state court), cert. denied, 516 U.S. 1050 (1996); *In re Lindsey*, 875 F.2d 1502, 1504-1505 (11th Cir. 1989) (after federal habeas relief was denied and successive federal petition raising competency claim was dismissed as unexhausted, habeas petitioner sought appointment of new counsel and expert psychiatrist to pursue competency claim in state court). The federal habeas statutes—including the exhaustion requirement and the provision tolling the federal statute of limitations while a petition for state relief is pending, 28 U.S.C. 2244(d)(2)—en-

courage precisely the opposite practice: petitioning for relief in federal court should come only after thorough litigation in state court. See *Rhines*, 544 U.S. at 277 (a rule that "decreas[es] a petitioner's incentive to exhaust all his claims in state court prior to filing his federal petition" would "undermine[] AEDPA's goal of streamlining federal habeas proceedings"); *Duncan* v. *Walker*, 533 U.S. 167, 180 (2001).

Petitioner in this case is asking for Federal Defender Services to represent him in state clemency proceedings rather than state judicial proceedings, but that makes no difference. As the Sixth Circuit correctly recognized in applying its own precedent to this case, the same structural limitation bars state postconviction litigants from obtaining federal funding for *any* non-federal proceeding. Pet. Br. App. 11a. Indeed, except for the statutory reference to "executive *or other* clemency," see pp. 23-27, *infra*, petitioner offers absolutely no reasons why his reasoning would not lead to federal funding for capital counsel in any state judicial proceedings that follow a round of federal habeas litigation.[4] That result would run directly contrary to the goals of comity and federalism that are enshrined in Section 2254. A proper construction of Section 3599, by contrast, ensures that federal postconviction proceedings follow state review and

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[4] Indeed, even if Section 3599 were construed to permit funding for state-court litigation in some narrow circumstances (such as proceedings directly adjunct to a federal proceeding), funding for state clemency proceedings would still be unavailable, because of the substantive difference between federal habeas proceedings and state clemency proceedings. But if Section 3599 is construed to cover state clemency proceedings, it is difficult to see why funding for *all* state judicial proceedings (subsequent to the federal appointment of counsel) would not follow.

"avoid[s] the 'unseemliness' of a federal district court's overturning a state court conviction without the state courts having had an opportunity to correct the constitutional violation in the first instance." *O'Sullivan* v. *Boerckel*, 526 U.S. 838, 845 (1999) (citation omitted); see *id.* at 844 (exhaustion requirement is rooted in "[c]omity").

4. Other aspects of the 1988 Act, and subsequent federal enactments in this area, confirm that Section 3599 was not intended to reshape the law of postconviction relief by dispatching federally funded lawyers to state court. Rather, the federal role has been limited to encouraging States themselves to provide capital defendants with counsel for postconviction review and other stages at which attorneys are not constitutionally required.

In the same statute that enacted what is now Section 3599, Congress added a supplemental appropriation for indigent criminal defense. 1988 Act, Tit. X, 102 Stat. 4541. Those funds were partially earmarked for five new death penalty habeas corpus resource centers, see 134 Cong. Rec. 33,279 (1988) (remarks of Rep. Whitten); *id.* at 33,291 (remarks of Rep. Conte), which was in addition to five more that had been funded just two months before, see H.R. Rep. No. 979, 100th Cong., 2d Sess. 51 (1988). These death penalty resource centers were a cooperative federal-state endeavor; federal funds were used for the federal component of indigent capital defense, and state funds were used for the state component. See *1988 Reports of the Proceedings of the Judicial Conference of the United States* 17, 73-74; see also Arthur W. Ruthenbeck, *You Don't Have to Lose Your Shirt on Death Penalty Cases*, Crim. Justice, Spring 1988, at 10, 12 (veteran of the Administrative Office's

Defender Services Committee confirming that "[t]he [Criminal Justice Act] generally limits federal defender representation to federal proceedings," precluding them from "provid[ing] representation in collateral matters such as petitions to a governor for executive clemency," whereas organizations receiving both federal and state funds can provide "continuity of representation").

Since the 1988 Act, Congress has continued to encourage States to address concerns with the quality of postconviction representation in capital cases. One federal statute offers streamlined federal habeas review if a State provides adequate postconviction counsel in its own courts. See 28 U.S.C. 2261(b)(1), 2265(a)(1)(A). Another statute provides federal incentive grants to States that implement training programs to ensure the availability of trained capital defense counsel, at trial, on direct appeal, and on postconviction review. See Innocence Protection Act of 2004, Pub. L. No. 108-405, Tit. IV, § 421, 118 Stat. 2286 (42 U.S.C. 14163 (Supp. V 2005)). But Congress expressly does *not* underwrite litigation in state court. See § 421(c)(2), 118 Stat. 2286 (Federal grants "shall not be used to fund, directly or indirectly, representation in specific capital cases.").

B. The Legislative History Of Section 3599 Confirms That State Prisoners Are Not Entitled To Federal Funding For State Proceedings

The text and context of Subsection (e), particularly the careful use of the term "available" and the focus throughout Section 3599 on *federal* proceedings, are sufficient to rebut petitioner's claim to federal funding for his state clemency application. But even if the provision were ambiguous, the legislative history of Section 3599 refutes petitioner's assertion that the list of ser-

vices in Subsection (e) was deliberately crafted so that every service would be available both to habeas petitioners and to defendants on direct review. In fact, Subsection (e) was not written to apply to state habeas petitioners; they were added to the eligible class just a few hours before the bill passed both Houses of Congress in the final hours before the end-of-session adjournment.

The capital-punishment provisions of the 1988 Act were the first federal death-penalty statute enacted since this Court reaffirmed the constitutionality of capital punishment in *Gregg* v. *Georgia*, 429 U.S. 1301 (1976). They were intensely debated, and similar provisions had been defeated before. It is therefore unsurprising that the debate over adding a provision for federally funded counsel focused on the representation of federal defendants under the new federal death-penalty framework.

Funding for clemency counsel, along with other detailed rules for the appointment of counsel in death-penalty cases, was first added to the bill on the House floor, in an amendment by Representative Conyers. See 134 Cong. Rec. at 22,995-22,996. The Conyers amendment applied only to federal defendants and made *no* provision for the appointment of counsel for state prisoners filing federal habeas petitions. See *id.* at 22,995 (proposed Subsection (q)(1), making counsel available "in every criminal action in which a defendant is charged with a crime which may be punishable by death").[5] And

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[5] Petitioner contends that "[t]he provision for appointment of habeas counsel was actually added to the bill before the language requiring [representation] in available clemency proceedings." Pet. Br. 29 n.25. But the provision petitioner cites offers him little support. The original death-penalty provision (the Gekas amendment) did contain a paragraph providing for appointment of counsel "[i]n any [capital] post-

the amendment provided that federally funded representation would extend to "proceedings for executive or other clemency." *Ibid.* (proposed Subsection (q)(5)); *id.* at 22,996 (as modified). The Conyers amendment was adopted by voice vote. See *id.* at 22,997.

The bill then moved to the Senate, which began considering a comprehensive substitute bill that would have dropped the Conyers amendment. Compare 134 Cong. Rec. at 30,400-30,401, with *id.* at 22,984 (House death-penalty provision before adoption of Conyers amendment). Senator Levin then proposed a number of amendments, including provisions for appointment of counsel that restored and expanded on the Conyers amendment. See *id.* at 30,939; see also *id.* at 30,745-30,746 (sponsor's explanation). The Levin text was adopted by unanimous consent and was in the bill that passed the Senate. Like the Conyers proposal, it provided funding for counsel for "executive or other clemency," and it applied *only* to federal defendants and made no provision for the appointment of counsel for state prisoners. *Id.* at 30,939. Rather, Senator Levin described it as "providing for adequate representation for the defendant on appeal." *Id.* at 30,746.

The amended bill returned to the House. After midnight on the last day of the session,[6] the House passed the bill again, with further amendments. Inserted in the

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conviction proceeding under section 2254 or 2255." 134 Cong. Rec. at 22,984 (proposed Subsection (q)(4)). But that paragraph did not provide for representation outside federal court, let alone for clemency representation, federal or state. And it was superseded ninety minutes after adoption by the Conyers amendment, which completely rewrote Subsection (q) and deleted the reference to Section 2254 claimants.

[6] See 134 Cong. Rec. at 33,150, 33,318 (bill debated between 12:30 a.m. and 1 a.m.).

provision for funding of counsel, without debate or explanation, was the provision now codified as Section 3599(a)(2), extending the eligibility for counsel to postconviction litigants under Sections 2254 and 2255 (whom the added text called "defendant[s]," presumably to fit the addition more easily into a statute that had been written for defendants rather than postconviction litigants). See 134 Cong. Rec. at 33,215. Shortly thereafter, at 3:16 a.m., the Senate agreed to the House amendments by voice vote and joined the House in adjourning for the year. *Id.* at 32,678.

This history demonstrates that the list of services set out in Subsection (e) was written to apply to federal defendants at trial and on direct review. When Congress made state postconviction litigants eligible for federal funding, it was not making a conscious effort to expand the federal role in the administration of the death penalty in the States. (To the contrary, Congress considered but postponed action on major changes to federal habeas review of state convictions, in anticipation of a report on the subject by retired Justice Powell. See 1988 Act, § 7323, 102 Stat. 4467.) Still less did Congress seek to create a federal role in state clemency proceedings for the first time.

C. Petitioner's Interpretation Is Not Necessary To Give Meaning To "Executive Or Other Clemency"

The reference in Subsection (e) to "executive or other clemency" does not undo the natural reading of the statute or refute the confirming legislative history. Petitioner contends (Br. 23-24) that non-executive ("other") clemency is used at the state level but not the federal level, and that Congress therefore must have contemplated funding clemency counsel at both levels. That

contention lacks merit. Neither the phrase itself, its history, nor the context of its enactment suggests that Congress included it as a subtle direction to assume responsibility for funding state-level clemency proceedings. Instead, the provision's legislative history plainly demonstrates that its authors intended it to apply purely to federal defendants.

First, it is implausible to think that Congress would have made an exception to the rule of federal funding for federal proceedings (discussed above) merely by including the ambiguous two-word phrase "or other." The resulting expansion of Section 3599's scope would be the kind of "radical departure[] from past practice" that Congress would state clearly, not by indirection. *Jones* v. *United States*, 526 U.S. 227, 234 (1999); see *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 543 (1994); *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 693-694 (1983). That is so especially because of the potential friction with values of federalism that would result from federal courts' appointing lawyers to litigate in state court or before state executive officials, and supervising their representation according to federal standards. See *United States* v. *Bass*, 404 U.S. 336, 349 (1971) (courts should not lightly infer an intent to alter the federal-state balance); cf. *Leis* v. *Flynt*, 439 U.S. 438, 442 (1979) (per curiam) (noting that "the licensing and regulation of lawyers" has been a state function "[s]ince the founding of the Republic"); *Columbus Bar Ass'n* v. *Torian*, 829 N.E.2d 1210, 1212-1214 (Ohio 2005) (disciplining attorney for deficient representation in pardon and commutation proceedings); *The Florida Bar* v. *Larkin*, 420 So. 2d 1080, 1080-1082 (Fla. 1982) (same).

Second, such a strained construction is not necessary to give meaning to the phrase "or other." Congress may

reasonably have sought to make clear that federal prisoners could receive funding for proceedings before the Executive himself *and* for proceedings before other persons whom he may enlist to help review clemency applications. See, *e.g.*, 28 C.F.R. 1.10(c) (providing for an oral presentation to the Office of the Pardon Attorney by counsel for federal prisoners under a death sentence). Indeed, history shows that these other persons may not be officials of the Executive Branch at all. Faced with large numbers of pardon applications relating to draft evasion, both Presidents Truman and Ford empaneled commissions of distinguished citizens—including former members of the Judicial and Legislative Branches—to make recommendations on individual applications.[7] In some cases these boards held hearings and took personal testimony.[8] Proceedings before federal entities of this sort are far more likely to have been what Congress meant by the phrase "or other."

Third, it is abundantly clear from the legislative history of Section 3599 that "executive or other clemency" was written to refer exclusively to federal proceedings. As detailed above, in both the House and the Senate, funding for counsel in "proceedings for executive or other clemency" was added to the bill at a time when the

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[7] See Exec. Order No. 9814, 3 C.F.R. 594 (1943–1948 comp.); *Statement by the President upon Signing Order Creating an Amnesty Board to Review Convictions Under the Selective Service Act*, Pub. Papers 511 (1946) (appointing former Justice Owen Roberts as chairman); Exec. Order No. 11,803, 3A C.F.R. 168 (1974 comp.); Presidential Clemency Board, *Report to the President* 219-224 (1975) (*Clemency Board Report*) (detailing the Board's membership, including former Senator Charles Goodell as chairman, various federal and state officials, and private citizens).

[8] *Clemency Board Report* 25-26.

bill applied *only* to federal defendants. See pp. 21-22, *supra*. Plainly, therefore, neither chamber intended "or other" to refer to proceedings on the state level, because both chambers adopted the "or other" language at a time when they contemplated funding *no* proceedings on the state level.

Fourth, petitioner (relying on the Tenth Circuit's opinion in *Hain*) significantly overstates the existence of non-executive clemency even on the state level. Pet. Br. 24. For instance, the Tenth Circuit asserted that in Connecticut the clemency power is legislative in nature; but both in 1988 and today, the clemency power was and is exercised by a board of gubernatorial appointees. Conn. Gen. Stat. Ann. § 54-124a (West Supp. 2008). Cf. Pet. Br. 24 n.23 (asserting that a board of executive appointees is necessarily part of an "executive," not "other," clemency proceeding); *Hain*, 436 F.3d at 1174 n.7 (same). The Tenth Circuit also suggested that in some other States the legislature may grant clemency. But in each of those States that is true only for the offense of treason against the State, a noncapital (and largely defunct) crime, see, *e.g.*, Fla. Stat. Ann. §§ 876.32, 775.082(3)(b) (West 2001). In capital cases executive officials (the governor, gubernatorial appointees, or other elected officials such as the attorney general) exercise the clemency power. See Fla. Const. Art. IV, § 8; Idaho Const. Art. IV, § 7; Idaho Code Ann. § 20-210 (2004); Ind. Const. Art. V, § 17; Ky. Const. § 77; Neb. Const. Art. IV, § 13; N.Y. Const. Art. 4, § 4; Ohio Const. Art. III, § 11; Or. Const. Art. V, § 14; Utah Const. Art. 7, § 12; Wyo. Const. Art. 4, § 5. Accord Governors' Br. 4-5. Finally, in California and Nevada, the justices of the state supreme court can block clemency in some cases, but actually *granting* clemency always requires

the governor's approval. See Cal. Const. Art. V, § 8(a); Nev. Const. Art. 5, § 14(1).[9] Thus, contrary to the Tenth Circuit's suggestion (and petitioner's), clemency in capital cases is in fact an executive function throughout the Nation. Accord Margaret Colgate Love, *Relief from the Collateral Consequences of a Criminal Conviction* 23 (2006). At a minimum, at the time Section 3599 was originally enacted, non-executive clemency was not a regular feature of state death-penalty proceedings. Thus, there would be no reason to think that Congress included the words "or other" to refer to such a practice on the state level, even if the legislative history did not conclusively show that Congress wrote the phrase "executive or other clemency" with federal defendants in mind.

D. Congress's 2006 Recodification Removed Any Doubt By Ratifying The Consensus View That Section 3599 Funds Only Federal Proceedings

When Congress re-enacted the former Section 848(q)(4)-(10) as Section 3599 and made no substantive change, it is presumed to have consciously ratified the settled interpretation of the statute's language. See, *e.g.*, *Keene Corp.* v. *United States*, 508 U.S. 200, 212-213 (1993); *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978). Although petitioner contended at the petition stage (Pet. 15-16) that this principle supported his position, he now argues only that there was "no settled judicial interpre-

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[9] The Tennessee Supreme Court can recommend commutation of a death sentence based on "extenuating circumstances," but the ultimate decision is the governor's. Tenn. Code Ann. §§ 40-27-105, 40-27-106 (2006). Petitioner does not claim that he is eligible for a form of "other clemency" under this procedure. See Pet. Br. App. 27a (petitioner intends to seek clemency "from the Governor").

tation" of the former statute when Congress recodified it. Pet. Br. 29. That contention is incorrect, because the only appellate decision that petitioner identifies as "unsettling" the law at the time of the 2006 recodification is an Eighth Circuit opinion relying on an aspect of the statute that no longer existed in 2006.

Congress finalized the text of Section 3599 in December 2005, when a House-Senate conference committee reported out the finished product. See H.R. Conf. Rep. No. 333, 109th Cong., 1st Sess. 1 (2005).[10] The only circuits to have taken a position on the existing language by then—the Fifth, Sixth, and Eleventh—had all held that it applies only to federal proceedings. *King*, 312 F.3d at 1366-1368 (no application to state clemency proceedings); *Clark*, 278 F.3d at 461-463 (same); *House*, 332 F.3d at 997 (no application to litigation in state court); *Sterling*, 57 F.3d at 458 (same); *Lindsey*, 875 F.2d at 1506-1507 (same).

At that time the single appellate decision leaning in the other direction was *Hill* v. *Lockhart*, 992 F.2d 801 (8th Cir. 1993).[11] The Eighth Circuit denied funding for

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[10] Final passage by the Senate took some months for unrelated reasons, see 152 Cong. Rec. S1631-S1632 (daily ed. Mar. 2, 2006), because the statute was part of the USA PATRIOT Act reauthorization. By that time the en banc Tenth Circuit had adopted petitioner's reading. *Hain*, 436 F.3d at 1170. As we noted at the petition stage, that development postdated not only the crafting of the recodification language but also passage by the House, and it is therefore entitled to little or no weight in divining legislative intent to ratify prevailing law. U.S. Cert. Amicus Br. 15-16. Petitioner does not dispute this point. See Pet. Br. 29-31.

[11] Petitioner also points to a few district court decisions, which were not binding precedent even in the courts that rendered them, and which accordingly do not refute the courts of appeals' contrary consensus. See, *e.g.*, *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 385-386 &

state clemency proceedings. The court concluded that federal funding is plainly not available to pursue unexhausted claims in state court, but it thought the availability of federal funding for state clemency or competency proceedings was "far less clear." *Id.* at 803. While the court thought "[t]he plain language of § 848(q) evidences a congressional intent to insure that indigent state petitioners receive 'reasonably necessary' competency and clemency services from appointed, compensated counsel," it also acknowledged that such a reading would create perverse incentives to file federal habeas petitions to qualify for federal funding for state proceedings. *Ibid.* The court resolved the tension by turning to statutory language that, at the time, limited attorney compensation to "amounts * * * reasonably necessary to carry out the requirements of" the statute. 21 U.S.C. 848(q)(10) (1994). That "reasonably necessary" language, the Eighth Circuit held, required three inquiries before approving funding for a state competency or clemency proceeding: whether the underlying federal habeas petition was frivolous; whether state law provides no avenue to obtain compensation for these services; and (in most cases) whether counsel requested authorization before performing the services. 992 F.3d at 803. The Eighth Circuit denied funding based on counsel's failure to satisfy any of the three preconditions; the underlying Section 2254 petition had been frivolous and Arkansas might pay for clemency counsel. See *id.* at 803-804.

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n.21 (1983) (recognizing that Congress ratified a "well-established judicial interpretation" notwithstanding two contrary district court decisions); cf. *Pierce* v. *Underwood*, 487 U.S. 552, 567 (1988) (noting that "the almost uniform *appellate* interpretation" contradicted the position supposedly ratified by Congress) (emphasis added).

Congress subsequently deleted the "reasonably necessary" criterion. See Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 903(b), 110 Stat. 1318. Attorneys' appointment and compensation no longer turn on a finding of reasonable necessity. See 18 U.S.C. 3599(g)(1) and (2).

The Eighth Circuit did not have to resolve the question presented here, because it was able to deny funding based on what it considered to be limiting language. Whether, without that limiting language, it would have decided in petitioner's favor a question it deemed "far less clear" (*Hill*, 992 F.2d at 803) is difficult to determine. But what it *did* decide was that the language about reasonable necessity had considerable (indeed, dispositive) significance. And that language was deleted ten years before the statute's re-enactment. Although some district courts in the Eighth Circuit have continued to approve funding for state clemency counsel based on *Hill*, ultimately the discussion on which petitioner relies was dictum, and it therefore is not relevant to the existence of a settled judicial consensus. See *Jama* v. *ICE*, 543 U.S. 335, 351 n.12 (2005) ("Dictum settles nothing, even in the court that utters it.").

E. Congress Had Valid Reasons For Restricting Federal Funding To Federal Proceedings

Petitioner and his amici devote considerable effort to establishing the relatively uncontroversial proposition that an indigent's clemency application is more likely to be persuasive with a lawyer's help than without it. Congress recognized as much in providing clemency counsel for indigent *federal* inmates who are sentenced to death. But petitioner does not provide any basis from which to

conclude Congress intended federal funding for proceedings purely on the state level.

One amicus asserts that providing federal funding for counsel in federal habeas proceedings but not in state clemency proceedings would be "altogether irrational." Constitution Project Br. 8. In fact, Congress could conclude, entirely rationally, that the federal interest in indigent defense (over and above that required by the Sixth Amendment) extends to federal-court proceedings to protect federal *constitutional* rights, but not to state clemency proceedings, which may turn on a host of practical and political considerations and in which no distinct federal rights are at stake. Likewise, Congress may have decided that funding lawyers with federal tax dollars to represent defendants in such state clemency proceedings would present unique federalism concerns.

In habeas proceedings, federally appointed counsel focus on developing evidence and argument relevant to "violation[s] of the Constitution or laws or treaties of the United States," 28 U.S.C. 2254(a), rather than on arguments cognizable only under state law or appeals to the executive's discretion (such as contrition or good works while in prison). Some constitutional claims (such as mental illness, unconstitutionally ineffective failure to develop mitigating evidence, or withholding of exculpatory evidence) would also have a bearing on clemency. But the primary legal forums for developing and vindicating such claims are state courts and federal habeas proceedings, not state clemency. Capital inmates currently have access to counsel in both of those primary forums. Virtually every State offers postconviction

counsel to indigent capital defendants.[12] And Congress has acted to encourage States to make improvements in that area—while disclaiming any role in funding state postconviction litigation for individual inmates. See p. 20, *supra*.

Nor is it the case that federal funding for clemency counsel is necessary to ensure continuity of representation between federal habeas counsel and clemency counsel (Pet. Br. 33-34; Governors' Br. 18-19). Most counsel appointed under Section 3599 are not federal defender organizations, as in this case, but private attorneys selected from a panel of available counsel. See Subcomm. on Fed. Death Penalty Cases, Judicial Conf. of the U.S., *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* §§ I(C)(4), II(4) (May 1998) <http://www.uscourts.gov/library/dpenalty/4REPORT.htm>. Provided these attorneys have the requisite bar membership, they may well be able to transition into the role of clemency counsel if appointed to that role under state law.[13] In any event, this "continuity" argument proves too much; on petitioner's reasoning, once a prisoner seeks federal habeas relief, *no* State should provide new counsel for state clemency (or successive state habeas) proceedings, and the federally appointed lawyer should remain with

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[12] See, *e.g.*, Constitution Project Amicus Br. at 2-3, *Barbour* v. *Allen* (No. 06-10605) (informing this Court that every death-penalty State except Alabama pays for postconviction counsel in capital cases). The same amicus suggests here that "[m]any states do not guarantee counsel in state habeas proceedings at all," Constitution Project Br. 7, but omits the special provision for capital cases that it has previously brought to this Court's attention.

[13] See, *e.g.*, *Marks* v. *Superior Court*, 38 P.3d 512, 518 (Cal. 2002); Fla. Stat. Ann. §§ 27.5303(4)(b), 27.5304(5)(b) (West Supp. 2008).

the case permanently. As discussed above, p. 20, *supra*, Congress would not have meant to displace States' commendable efforts to fund their own indigent-defense efforts.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 18 U.S.C. 3599 provides:

Counsel for financially unable defendants

(a)(1) Notwithstanding any other provision of law to the contrary, in every criminal action in which a defendant is charged with a crime which may be punishable by death, a defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services at any time either—

(A) before judgment; or

(B) after the entry of a judgment imposing a sentence of death but before the execution of that judgment;

shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f).

(2) In any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f).

(b) If the appointment is made before judgment, at least one attorney so appointed must have been admitted to practice in the court in which the prosecution is to be tried for not less than five years, and must have had

not less than three years experience in the actual trial of felony prosecutions in that court.

(c) If the appointment is made after judgment, at least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases.

(d) With respect to subsections (b) and (c), the court, for good cause, may appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation.

(e) Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

(f) Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on be-

half of the defendant and, if so authorized, shall order the payment of fees and expenses therefor under subsection (g). No ex parte proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made concerning the need for confidentiality. Any such proceeding, communication, or request shall be transcribed and made a part of the record available for appellate review.

(g)(1) Compensation shall be paid to attorneys appointed under this subsection at a rate of not more than $125 per hour for in-court and out-of-court time. The Judicial Conference is authorized to raise the maximum for hourly payment specified in the paragraph up to the aggregate of the overall average percentages of the adjustments in the rates of pay for the General Schedule made pursuant to section 5305 of title 5 on or after such date. After the rates are raised under the preceding sentence, such hourly range may be raised at intervals of not less than one year, up to the aggregate of the overall average percentages of such adjustments made since the last raise under this paragraph.

(2) Fees and expenses paid for investigative, expert, and other reasonably necessary services authorized under subsection (f) shall not exceed $7,500 in any case, unless payment in excess of that limit is certified by the court, or by the United States magistrate judge, if the services were rendered in connection with the case disposed of entirely before such magistrate judge, as necessary to provide fair compensation for services of an unusual character or duration, and the amount of the excess payment is approved by the chief judge of the circuit. The chief judge of the circuit may delegate such approval authority to an active circuit judge.

(3) The amounts paid under this paragraph for services in any case shall be disclosed to the public, after the disposition of the petition.

2. 28 U.S.C. 2253 provides in pertinent part:

Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

* * * * *

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

* * * * *

3. 28 U.S.C. 2244 provides in pertinent part:

Finality of determination

* * * * *

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a per-

son in custody pursuant to the judgment of a State court. * * *

* * * * *

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

4. 28 U.S.C. 2254 provides in pertinent part:

State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the

applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

* * * * *

5. 28 U.S.C. 2261 provides in pertinent part:

Prisoners in State custody subject to capital sentence; appointment of counsel; requirement of rule of court or statute; procedures for appointment

(a) This chapter shall apply to cases arising under section 2254 brought by prisoners in State custody who are subject to a capital sentence. It shall apply only if the provisions of subsections (b) and (c) are satisfied.

(b) COUNSEL.—This chapter is applicable if—

(1) the Attorney General of the United States certifies that a State has established a mechanism for providing counsel in postconviction proceedings as provided in section 2265; and

(2) counsel was appointed pursuant to that mechanism, petitioner validly waived counsel, petitioner retained counsel, or petitioner was found not to be indigent.

* * * * *

6. 28 U.S.C. 2265 provides in pertinent part:

Certification and judicial review

(a) CERTIFICATION.—

(1) IN GENERAL.—If requested by an appropriate State official, the Attorney General of the United States shall determine—

(A) whether the State has established a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State postconviction proceedings brought by indigent prisoners who have been sentenced to death;

(B) the date on which the mechanism described in subparagraph (A) was established; and

(C) whether the State provides standards of competency for the appointment of counsel in proceedings described in subparagraph (A).

(2) EFFECTIVE DATE.—The date the mechanism described in paragraph (1)(A) was established shall be the effective date of the certification under this subsection.

(3) ONLY EXPRESS REQUIREMENTS.—There are no requirements for certification or for application of this chapter other than those expressly stated in this chapter.

(b) REGULATIONS.—The Attorney General shall promulgate regulations to implement the certification procedure under subsection (a).

* * * * *

7. The Innocence Protection Act of 2004, Pub. L. No. 108-405, Tit. IV, Subtit. B, 118 Stat. 2286-2288 (42 U.S.C. 14163-14163a (Supp. V 2005)), provides in pertinent part:

SEC. 421. CAPITAL REPRESENTATION IMPROVEMENT GRANTS.

(a) IN GENERAL.—The Attorney General shall award grants to States for the purpose of improving the quality of legal representation provided to indigent defendants in State capital cases.

(b) DEFINED TERM.—In this section, the term "legal representation" means legal counsel and investigative, expert, and other services necessary for competent representation.

(c) USE OF FUNDS.—Grants awarded under subsection (a)—

(1) shall be used to establish, implement, or improve an effective system for providing competent legal representation to—

(A) indigents charged with an offense subject to capital punishment;

(B) indigents who have been sentenced to death and who seek appellate or collateral relief in State court; and

(C) indigents who have been sentenced to death and who seek review in the Supreme Court of the United States; and

(2) shall not be used to fund, directly or indirectly, representation in specific capital cases.

(d) APPORTIONMENT OF FUNDS.—

(1) IN GENERAL.—Of the funds awarded under subsection (a)—

(A) not less than 75 percent shall be used to carry out the purpose described in subsection (c)(1)(A); and

(B) not more than 25 percent shall be used to carry out the purpose described in subsection (c)(1)(B).

(2) WAIVER.—The Attorney General may waive the requirement under this subsection for good cause shown.

(e) EFFECTIVE SYSTEM.—As used in subsection (c)(1), an effective system for providing competent legal representation is a system that—

(1) invests the responsibility for appointing qualified attorneys to represent indigents in capital cases—

(A) in a public defender program that relies on staff attorneys, members of the private bar, or both, to provide representation in capital cases;

(B) in an entity established by statute or by the highest State court with jurisdiction in criminal cases, which is composed of individuals with demonstrated knowledge and expertise in capital cases, except for individuals currently employed as prosecutors; or

(C) pursuant to a statutory procedure enacted before the date of the enactment of this Act under which the trial judge is required to appoint qualified attorneys from a roster maintained by a

State or regional selection committee or similar entity; and

(2) requires the program described in paragraph (1)(A), the entity described in paragraph (1)(B), or an appropriate entity designated pursuant to the statutory procedure described in paragraph (1)(C), as applicable, to—

(A) establish qualifications for attorneys who may be appointed to represent indigents in capital cases;

(B) establish and maintain a roster of qualified attorneys;

(C) except in the case of a selection committee or similar entity described in paragraph (1)(C), assign 2 attorneys from the roster to represent an indigent in a capital case, or provide the trial judge a list of not more than 2 pairs of attorneys from the roster, from which 1 pair shall be assigned, provided that, in any case in which the State elects not to seek the death penalty, a court may find, subject to any requirement of State law, that a second attorney need not remain assigned to represent the indigent to ensure competent representation;

(D) conduct, sponsor, or approve specialized training programs for attorneys representing defendants in capital cases;

(E)(i) monitor the performance of attorneys who are appointed and their attendance at training programs; and

"(ii) remove from the roster attorneys who—

"(I) fail to deliver effective representation or engage in unethical conduct;

"(II) fail to comply with such requirements as such program, entity, or selection committee or similar entity may establish regarding participation in training programs; or

"(III) during the past 5 years, have been sanctioned by a bar association or court for ethical misconduct relating to the attorney's conduct as defense counsel in a criminal case in Federal or State court; and

(F) ensure funding for the cost of competent legal representation by the defense team and outside experts selected by counsel, who shall be compensated—

(i) in the case of a State that employs a statutory procedure described in paragraph (1)(C), in accordance with the requirements of that statutory procedure; and

(ii) in all other cases, as follows:

(I) Attorneys employed by a public defender program shall be compensated according to a salary scale that is commensurate with the salary scale of the prosecutor's office in the jurisdiction.

(II) Appointed attorneys shall be compensated for actual time and service, computed on an hourly basis and at a reasonable hourly rate in light of the qualifications and experience of the attorney and the local market for legal representation in

cases reflecting the complexity and responsibility of capital cases.

(III) Non-attorney members of the defense team, including investigators, mitigation specialists, and experts, shall be compensated at a rate that reflects the specialized skills needed by those who assist counsel with the litigation of death penalty cases.

(IV) Attorney and non-attorney members of the defense team shall be reimbursed for reasonable incidental expenses.

SEC. 422. CAPITAL PROSECUTION IMPROVEMENT GRANTS.

(a) IN GENERAL.—The Attorney General shall award grants to States for the purpose of enhancing the ability of prosecutors to effectively represent the public in State capital cases.

(b) USE OF FUNDS.—

(1) PERMITTED USES.—Grants awarded under subsection (a) shall be used for one or more of the following:

(A) To design and implement training programs for State and local prosecutors to ensure effective representation in State capital cases.

(B) To develop and implement appropriate standards and qualifications for State and local prosecutors who litigate State capital cases.

(C) To assess the performance of State and local prosecutors who litigate State capital cases,

provided that such assessment shall not include participation by the assessor in the trial of any specific capital case.

(D) To identify and implement any potential legal reforms that may be appropriate to minimize the potential for error in the trial of capital cases.

(E) To establish a program under which State and local prosecutors conduct a systematic review of cases in which a death sentence was imposed in order to identify cases in which post-conviction DNA testing may be appropriate.

(F) To provide support and assistance to the families of murder victims.

(2) PROHIBITED USE.—Grants awarded under subsection (a) shall not be used to fund, directly or indirectly, the prosecution of specific capital cases.

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AMICUS CURIAE BRIEF

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(4)

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IN THE
Supreme Court of the United States

EDWARD JEROME HARBISON,
Petitioner,

v.

RICKY BELL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR *AMICUS CURIAE* CONSTITUTION PROJECT IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Constitution Project is a nonprofit and nonpartisan organization seeking consensus solutions to difficult legal and constitutional issues. The Project seeks to achieve this goal through constructive dialogue across ideological and partisan lines, and through scholarship, activism, and public education efforts. The Project has earned wide-ranging respect for its expertise and reports, including practical material designed to make constitutional issues a part of ordinary political debate.

The Project's blue-ribbon Death Penalty Committee includes both prominent supporters and opponents of the death penalty who are united in their profound concern that procedural safeguards and other assurances of fundamental fairness in the administration of capital punishment be robust, and the flaws in such procedural safeguards corrected. The Committee's members have testified before Congress and state legislatures in support of successful reforms to the death penalty process.

Moreover, the Death Penalty Committee has made specific recommendations to ensure the availability of effective counsel throughout the

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, nor did any party, any counsel for a party, nor any person other than *amicus*, its members, or its counsel make a monetary contribution intending to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

capital process. As noted in its recent report *Mandatory Justice: The Death Penalty Revisited*, "[t]he lack of adequate counsel to represent capital defendants is likely the gravest of the problems that render the death penalty, as currently administered, arbitrary, unfair, and fraught with serious error – including the real possibility of executing an innocent person."[2] As such, the Committee has recommended that competent and adequately compensated counsel be provided at all stages of capital litigation – including during the critical clemency process.[3]

SUMMARY OF ARGUMENT

The Constitution Project submits this brief to highlight the critical role that clemency plays in the American system of justice. Throughout its jurisprudence, this Court has widely recognized and relied upon clemency as a backstop to any fallibility in the criminal justice system, reinforcing the view that Congress's provision of federally-funded counsel for capital defendants includes the clemency process. As this Court has repeatedly recognized, the clemency process performs unique functions in the criminal justice system that are not duplicated elsewhere. The clemency process serves as an error-correction means of last resort at the end of the habeas process, which may reveal and allow state

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[2] The Constitution Project, *Mandatory Justice: The Death Penalty Revisited*, at 1 (2005), *available at* http://www.constitutionproject.org/pdf/MandatoryJusticeRevisited.pdf.

[3] *Id.* at 5-6.

officials to consider evidence no court has ever been able to examine. The clemency process also permits the state executive to weigh the state's interest in mitigating a sentence, in an exercise of mercy that no court can undertake.

However, that process may be rendered meaningless without the assistance of an attorney. Death row inmates as a class are most in need of the assistance of counsel to present their clemency case in a clear and articulate manner. Capital defendants are disproportionately uneducated, have below average intelligence, and have substantial psychological problems and mental deficiencies. In many individual cases, the very personal circumstances that may make mitigation of a death sentence appropriate are those that prevent a defendant from presenting a case on his or her own. For the system to ensure that capital punishment is imposed only on those who are unquestionably guilty and truly deserving of a death sentence, the assistance of an attorney is essential.

ARGUMENT

I. CLEMENCY IS AN INTEGRAL COMPONENT OF THE CAPITAL REVIEW PROCESS.

Clemency performs an integral function in the capital appeals process, one that complements the role of federal habeas courts. There are at least two critical functions that the clemency process plays that federal habeas review does not. First, clemency is a means of last resort for correcting error in the process, including the consideration of evidence

bearing on the defendant's actual innocence that may not have been presented to a court. Second, the clemency process permits the state executive to consider sentencing factors that courts, for a variety of reasons, may not have been able to take into account, such as capital defendants' blameworthiness, the proportionality of the sentence, and the desirability of exercising mercy. Clemency, in other words, provides a final opportunity to review both defendants' convictions and their sentences.

1. This Court has traced the central place of clemency throughout history and repeatedly emphasized and relied upon the role of clemency as a backstop for claims of actual innocence in the process of postconviction review. The clemency process is the final chance for a death row inmate to provide evidence of his or her actual innocence, or other evidence tending to undermine the guilty verdict – including evidence not presented to any court or jury.

The Court's most clear statement of its reliance on a robust clemency process to ensure the correction of erroneous verdicts was articulated in *Herrera v. Collins*, 506 U.S. 390 (1993). In *Herrera*, the Court essentially foreclosed claims of actual innocence on habeas review that were not presented to the trial court. Integral to the Court's holding was that clemency provides a mechanism for review of the potential errors that habeas review is not able to correct: it is the "'fail safe' in our criminal justice system." *Id.* at 415; *see also id.* at 417 (clemency is the "remedy for claims of innocence based on new evidence, discovered too late in the day to file a new

trial motion"). The Court also stressed the rich history of clemency in Anglo-American criminal law. It "can be traced back to the 700's," featured prominently in Blackstone's Commentaries and the Federalist Papers, and today is available in all thirty-six states that authorize capital punishment. *See id.* at 412-14. Indeed, "[c]lemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." *Id.* at 411-12 (footnote omitted).

The Court's emphasis on the fundamental importance of the clemency process, however, far precedes *Herrera*. In diverse circumstances, various members of the Court have characterized clemency as a "fail safe" mechanism for correcting errors in the judicial review process. In *Ex parte Grossman*, 267 U.S. 87 (1925), for example, Chief Justice Taft wrote that "[e]xecutive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law." *Id.* at 120. The Chief Justice added, "it has always been thought essential in popular governments, as well as in monarchies, to vest in some other authority than the courts power to ameliorate or avoid particular criminal judgments." *Id.* at 121. In *Fay v. Noia*, 372 U.S. 391 (1963), similarly, Justice Harlan acknowledged that the defendant's "predicament may well be thought one that strongly calls for [judicial] correction. But the proper course to that end lies with the New York Governor's powers of executive clemency, not with the federal courts." *Id.* at 476 (Harlan, J., dissenting, joined by Clark and

Stewart, JJ.). Justice Scalia expressed analogous sentiments in *Thompson v. Oklahoma*, 487 U.S. 815 (1988), dissenting from the Court's holding overturning a death sentence: "The Governor of Oklahoma, who can certainly recognize a frustration of the will of the citizens of Oklahoma more readily that we, would certainly have used his pardon power if there was some mistake here." *Id.* at 876 (Scalia, J., dissenting, joined by Rehnquist, C.J., and White, J.); *see also Kansas v. Marsh*, 548 U.S. 163, 198 (2006) (Scalia, J. concurring) (observing that "of course capital cases receive special attention in the application of executive clemency"); *Gregg v. Georgia*, 428 U.S. 153, 199 n.50 (1976) (noting that a criminal system that includes the death penalty but lacks clemency would be "totally alien to our notions of criminal justice").

The Court's concern about correcting wrongful capital convictions is well-founded. A prominent study revealed that 68% of death penalty convictions on appeal from 1973–1995 – *over two out of three* convictions during that time period – were thrown out during appeal or post-conviction proceedings due to serious error, defined as "error that substantially undermines the reliability of the guilt finding or death sentence imposed at trial."[4] Similarly, the Innocence Project estimates that at least 220 people have been exonerated *after* convictions for rape or murder thanks to DNA testing, 17 of whom had been

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[4] James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973–1995*, 78 Tex. L. Rev. 1839, 1850 (2000).

sentenced to death.[5] *See also Herrera*, 506 U.S. at 415 ("In his classic work, Professor Edwin Borchard compiled 65 cases in which it was later determined that individuals had been wrongfully convicted of crimes.").

These statistics also suggest that substantial numbers of errors remained uncorrected in cases where individuals are not fortunate enough to have effective habeas counsel or hard scientific evidence to establish their innocence. Many states do not guarantee counsel in state habeas proceedings at all, and claims not raised in state proceedings may not be considered by federal habeas courts.[6] And the reversal rate where DNA testing is available points to a failure of the courts to adequately review claims of innocence – one study concludes that courts reversed only 14 percent of convictions in which the defendant was later exonerated *before* the DNA testing took place, meaning that "the appellate and postconviction process did not effectively ferret out innocence."[7] These exonerated individuals, of course,

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[5] The Innocence Project Case Profiles, http://www.innocenceproject.org/know (last visited Sept. 12, 2008); *see also* Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 60 (2008).

[6] *See Murray v. Giarratano*, 492 U.S. 1, 30-31 (1989) (Stevens, J., dissenting) (only 18 of the 37 states authorizing capital punishment "automatically provide their indigent death row inmates counsel to help them initiate state collateral proceedings," though another 13 "have created governmentally funded resource centers to assist counsel in litigating capital cases").

[7] Garrett, *supra* note 5, at 61.

were the ones fortunate enough to have effective representation provided to them as well as available DNA evidence.

The unsettlingly high probability of error demonstrated by these statistics, the importance of effective counsel in developing evidence, and the criminal justice system's historic reliance on clemency to correct errors all strongly suggest that Congress intended for paid appointed counsel to be available in clemency proceedings. It would have been altogether irrational for Congress to have provided for such paid counsel in federal habeas proceedings, but not during the clemency process that is the "fail safe" for judicial review. If grave mistakes are common at trial and exculpatory evidence emerges with some regularity after conviction, it is critical for clemency to be available and more than an empty formality. *See Herrera*, 506 U.S. at 415 ("[H]istory is replete with examples of wrongfully convicted persons who have been pardoned in the wake of after-discovered evidence establishing their innocence. . . . Recent authority confirms that over the past century clemency has been exercised frequently in capital cases in which demonstrations of 'actual innocence' have been made.").

2. It is not just erroneous convictions that are addressed by the clemency process but also sentencing considerations that courts cannot easily take into account. One of the most important roles of clemency is assessing capital sentences that are disproportionate to the blameworthiness of the

defendant or to the offense. As noted by the American Bar Association, "[i]n cases of death row inmates, most clemencies are commutations to a long prison sentence, such as life in prison without parole."[8]

There is often no serious error in these cases with regard to guilt, but rather a reasoned conclusion by the executive that a particular defendant, though guilty, does not deserve to die. A robust clemency regime provides executive officials with the ability to recalibrate sentences to better reflect the goals of the criminal justice system.[9] And just as subsequent proceedings can turn up new evidence of guilt or innocence, they can also turn up evidence bearing directly on the appropriateness of a capital sentence.

As Justice Kennedy has noted, the opportunity to review capital sentences through clemency is

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[8] Adam C. Ortiz, *Clemency and Consequences: State Governors and the Impact of Granting Clemency to Death Row Inmates*, American Bar Association, at 1 (2002), http://www.abanet.org/crimjust/juvjus/juvdp/factsheetclemency.pdf (last visited Sept. 12, 2008).

[9] A comprehensive list of commutations in capital cases is available at Death Penalty Information Center – Clemency, http://www.deathpenaltyinfo.org/clemency. Many of these commutations were granted for reasons other than possible innocence. In 2007 and 2008 alone, for example, Kenneth Foster's sentence was commuted because he did not kill the victim but rather merely drove the getaway car; Samuel David Crowe's sentence was commuted because of his exemplary behavior and deep remorse in prison; Percy Walton's sentence was commuted because of his poor mental condition; and Kevin Young's sentence was commuted because of the disproportionality of the punishment. *See id.*

important because this is the one stage during which mercy can properly be considered and exercised:

> To help those who are serving under the minimums, the [American Bar Association] should consider a recommendation to reinvigorate the pardon process at the state and federal levels. The pardon process, of late, seems to have been drained of its moral force. Pardons have become infrequent. A people confident in its laws and institutions should not be ashamed of *mercy*.[10]

Put another way, "[a]mong its benign if too-often ignored objects, the clemency power can correct injustices that the ordinary criminal process seems unable or unwilling to consider. These mechanisms hold out the promise that mercy is not foreign to our system." *Dretke v. Haley*, 541 U.S. 386, 399 (2004) (Kennedy, J., dissenting); *see also id.* ("The rigors of the penal system are thought to be mitigated to some degree by the discretion of those who enforce the law.").

Consistent with Justice Kennedy's elaborations on the value of mercy, the Court has repeatedly recognized that the executive may reduce or eliminate punishment even where courts cannot. Thus in the recent decision of *Harmelin v. Michigan*, 501 U.S. 957 (1991), the Court, in an opinion by Justice Scalia, upheld a particularly severe state

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[10] Anthony M. Kennedy, Associate Justice, Supreme Court of the United States, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003) (emphasis added).

statute regulating the possession of cocaine. The Court declared that the application of the harsh penalty in any individual case was a matter for executive review, not judicial correction. *See id.* at 996 (although "petitioner's sentence is unique . . . . there remain[s] the possibilities of retroactive legislative reduction and executive clemency"). Similarly, in the much older decision of *Ex parte Wells*, 59 U.S. (18 How.) 307, 309 (1855), the Court made clear that the "first" meaning of clemency is "forgiveness, release, remission." The Court added that clemency was appropriate where "there might be a mitigation of the punishment without lessening the obligation of vindicatory justice," and that "[w]ithout such a power of clemency," justice "would be most imperfect and deficient in its political morality, and in that attribute of deity whose judgments are always tempered with mercy." *Id.* at 310.

There is thus no question that clemency plays a central role both in reviewing convictions for errors and in ensuring that the harshest of punishments is imposed only when it corresponds to the severity of the offense and is appropriate in the executive's sound discretion, taking into account information produced both at trial and after conviction. The emphasis on the clemency process as a crucial "fail safe" pervades this Court's jurisprudence, and provides the backdrop for the necessary conclusion that Congress in fact authorized the federal funding of counsel for clemency proceedings.

II. THE PARTICULAR CHARACTERISTICS OF CAPITAL DEFENDANTS MEAN THAT THE CLEMENCY PROCESS IS INEFFECTIVE WITHOUT FEDERALLY FUNDED COUNSEL.

Given that clemency is structurally and historically such an integral part of the capital review process, the danger is that the clemency process will become useless without the assistance of counsel at this critical step in the process. As the Constitution Project's Death Penalty Committee has noted, capital defense is demanding: it requires mastery of rapidly changing and complex legal doctrine and labor-intensive and time-consuming factual investigation.[11] Adequate attorney compensation that reflects these extraordinary responsibilities is necessary for capital defendants to consistently receive effective representation to present a coherent and persuasive case for clemency.[12] This is particularly true given the demographic characteristics of the population of capital convicts – which make them uniquely unsuited to present their cases.

Capital defendants as a group suffer from acute educational and mental deficiencies that make them particularly unequipped to navigate the clemency process on their own. One recent comprehensive analysis of studies to date on death row inmate

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[11] The Constitution Project, *Mandatory Justice: The Death Penalty Revisited*, at 1-2.

[12] *Id.* at 5-6.

characteristics concludes that "the intellectual, literacy, psychological deficits of most death row inmates render them incapable of responding to the demands of direct appeals or postconviction proceedings without the assistance and representation of qualified legal counsel."[13] There is no reason to doubt that this incapacity extends to the clemency petition stage as well.

Death-row inmates, as a group, tend to be relatively uneducated and display below-average intelligence that inhibits their ability to develop and prepare effective clemency petitions. More than half of all death row inmates did not even finish high school, and even those with some high-school experience have a functional literacy far below their limited grade level.[14] Various studies show that the mean IQ of death-row inmates is below the national average, and roughly 30 percent of death row inmates in two samples were considered to have

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[13] Mark D. Cunningham & Mark P. Vigen, *Death Row Inmate Characteristics, Adjustment, and Confinement: A Critical Review of the Literature*, 20 Behav. Sci. & Law 191, 206 (2002) (hereinafter "Cunningham & Vigen 2002"); *see id.* at 202 (study of capacity of Mississippi death row inmates to represent themselves on state habeas review concluded that "these death row inmates did not have the intellectual capability, academic skills, psychological resources, or legal knowledge to function as their own counsels in seeking habeas relief").

[14] Thomas P. Bonczar & Tracy L. Snell, *Capital Punishment, 2004*, Bureau of Just. Stat. Bull., Nov. 2004, at 6, *available at* http://www.ojp.usdoj.gov/bjs/ pub/pdf/cp04.pdf; Cunningham & Vigen 2002, *supra* note 13, at 199-200.

borderline mental retardation.[15] Indeed, one assessment of 44 death-row inmates in Mississippi concluded that almost half of the inmates scored below the 10th percentile in "verbal IQ," and 84.1% scored at or below the sixth-grade level in reading comprehension."[16]

Death row inmates are also more likely to be mentally ill and have severe psychological problems. Academic studies investigating the psychological functioning of death row inmates consistently find high rates of psychological disorders.[17] Though estimates vary, one study has estimated that 5-10 percent of such inmates have "serious" mental illness.[18] These mental health problems can often traced to physiological dysfunction and abnormalities in the brain.[19] Other studies have shown that

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[15] Cunningham & Vigen 2002, *supra* note 13, at 199; Richard L. Frierson et al., *Capital Versus Non-Capital Murderers*, 26 J. Am. Acad. Psychiatry & Law 403, 406-07 (1998).

[16] Mark P. Cunningham & Mark P. Vigen, *Without Appointed Counsel in Capital Postconviction Proceedings: The Self-Representation Competency of Mississippi Death Row Inmates*, 26 Crim. Justice & Behav. 293, 300-01 (1999) (hereinafter "Cunningham & Vigen 1999").

[17] Cunningham & Vigen 2002, *supra* note 13, at 200.

[18] Richard J. Bonnie, *Mentally Ill Prisoners on Death Row: Unsolved Puzzles for Courts and Legislatures*, 54 Cath. U. L. Rev. 1169, 1192 (2005).

[19] Dorothy O. Lewis et al., *Psychiatric, Neurological, and Psychoeducational Characteristics of 15 Death Row Inmates in the United States*, 143 Am. J. Psych. 838, 840-44 (1986); David Freedman & David Hemenway, *Precursors of Lethal Violence: A Death Row Sample*, 50 Soc. Sci. & Med. 1757, 1759-66 (2000).

substantial numbers of death row inmates have suffered severe head injuries (often via physical abuse) that may be the cause of neurological impairment.[20]

Indeed, those most impaired may be the most likely to have mitigating personal circumstances that may potentially warrant a grant of clemency if properly and thoroughly presented. According to one recent empirical analysis, it is already the case that death row inmates with less education are more likely to receive clemency than those with more education.[21] This trend may reflect a growing unease within the states with executing more mentally challenged inmates, as lower education levels likely correlate with greater mental impairment.[22] But a high level of mental impairment is hardly a factor that a capital defendant can fairly present without an attorney.

Moreover, aside from the relatively high incidence of borderline mental retardation, capital defendants may have mitigating personal circumstances that would be difficult for such individuals to fairly present themselves. Studies show that "[m]any if not most death row inmates have histories of paternal abandonment, foster care

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[20] Lewis et al, *supra* note 19, at 840; Cunningham & Vigen 1999, *supra* note 16, at 305-306; Freedman & Hemenway, *supra* note 19, at 1762.

[21] Michael Heise, *Mercy by the Numbers: An Empirical Analysis of Clemency and its Structure*, 89 Va. L. Rev. 239, 285-86 (2003).

[22] *Id.*

and institutionalization, abuse and neglect, and/or parental substance abuse."[23] One study found evidence of "extraordinary" physical and/or sexual abuse in 12 out of 15 death row inmates in the study.[24] A broader study of murder defendants similarly found that 84 percent had histories of physical abuse, and 32 percent had histories of sexual abuse.[25] This abuse can be traced in part to high rates of substance abuse among the parents of death row inmates – in one study as high as 57 percent.[26] These too are facts bearing on potential mitigation that should be clearly developed and presented to the state executive for consideration.

Capital defendants simply cannot effectively present their cases for clemency without the assistance of an attorney. Capital defendants as a class are overwhelmingly indigent.[27] In many cases trial counsel may not have fully developed all the facts that the capital defendant needs to rely upon in his clemency petition, in part due to meager financial resources that states provide for capital defense – and while trial counsel's conduct may not be so

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[23] Cunningham & Vigen 2002, *supra* note 13, at 202.

[24] Marilyn Feldman et al., *Filicidal Abuse in the Histories of 15 Condemned Murderers*, 14 Bull. Am. Acad. Psych. & Law 345, 348 (1986).

[25] Pamela Y. Blake et al., *Neurologic Abnormalities in Murderers*, 45 Neurology 1641, 1644 (1995).

[26] Cunningham & Vigen 2002, *supra* note 13, at 193.

[27] Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 Buff. L. Rev. 330, 334 (1995).

ineffective as to drop below the standards of *Strickland v. Washington*, 466 U.S. 668 (1984), counsel's failure to uncover certain facts or raise certain issues at trial may vastly narrow the scope of appellate review.[28] Indeed, one recent study analyzing the record of cases where convictions were later overturned based on DNA evidence concluded that, through each stage of trial and appellate review, key facts supporting innocence were not developed.[29] A good attorney may be able to develop or uncover new evidence never presented at trial or procedurally barred from consideration by a court. On the other hand, it is unrealistic, to say the least, that death row inmates would be able to develop and marshal these facts in support of their requests for clemency in the face of these barriers.

Given the evident shortcomings in the abilities of death row inmates on their own to present a compelling – or even coherent – case for clemency,

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[28] See Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 Yale L.J. 1835, 1841 (1994) ("Inadequate legal representation does not occur in just a few capital cases. It is pervasive in those jurisdictions which account for most of the death sentences."); The Constitution Project, *Mandatory Justice: The Death Penalty Revisited*, at 1-2.

[29] Garrett, *supra* note 5, at 121. That study concludes that the "exonerees [in the study] often did not invoke factual claims during their appeals and postconviction proceedings, much less claims of their innocence. Once we look at state law and indirect means for challenging the facts at trial, higher percentages brought factual claims, but significant percentages still did not. Very few succeeded on any claims related to the factual evidence supporting their convictions." *Id.* at 126.

the assistance of federally-funded counsel at the clemency stage is necessary for the clemency process to have any teeth at all. Attorneys must play an important role in obtaining, interpreting, and presenting the information necessary to make a convincing case for clemency. And a defendant's federal habeas attorney is in fact uniquely situated to play that role, having already expended considerable effort investigating and developing the facts on habeas review. That knowledge and expertise can be brought to bear on preparation of a clemency petition with only minimal incremental costs, yet substantial benefits to the defendant.

Finally, the assistance of attorneys in distilling and clarifying the issues in clemency petitions also performs a critical role in enhancing the transparency of state clemency review, which may be the most high-profile and publicly visible portion of any criminal defendant's post-conviction review. At a time where public skepticism that the death penalty is always accurately applied is on the rise,[30] it disserves both the state and the public not to have a clear presentation of reasons for potential clemency

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[30] *Over Three in Five Americans Believe in Death Penalty: Half of Americans Say Death Penalty Not a Deterrent to Others*, Harris Interactive, Mar. 18, 2008, http://www.businesswire.com/portal/site/home/?epi_menuItemID=8529ea2ad8631dcd3bb97904c6908a0c&epi_menuID=887566059a3aedb6efaaa9e27a808a0c&epi_baseMenuID=384979e8cc48c441ef0130f5c6908a0c&ndmViewId=news_view&newsLang=en&newsId=20080318005337 ("95 percent of U.S. adults say that sometimes innocent people are convicted of murder while only 5 percent believe that this never occurs.") (last visited Sept. 12, 2008).

in any particular case. The clemency decision is often the last step of a death row inmate's postconviction review, and acts of clemency tend to be highly public: as the American Bar Association has recognized, "[t]he act of clemency is not like other executive powers that are easily generalized as matters of policy, the ultimate fate of an individual who is easily identified and known to the public – and perhaps even despised – is in question."[31] Thus, the clemency process may serve as a barometer on the community's judgment of whether death is an appropriate punishment for the crimes committed.[32]

The clemency process as currently practiced is not without its flaws and its critics. But observers across the ideological spectrum hope that it can be successfully revitalized and returned to its historic role as a final check on accuracy and a final decision on the appropriateness of mercy. The clemency process cannot be revitalized unless capital defendants receive the effective assistance of counsel in presenting their cases to the state executive, thus bringing clarity to the process and enabling a fully informed decision.

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[31] Ortiz, *supra* note 8, at 1.

[32] "For criminal punishment to communicate consistently and effectively, criminal procedure must be transparent. Otherwise, current and prospective criminals, victims, and the public do not see justice done or hear the law's message." Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. Rev. 911, 947-48 (2006).

CONCLUSION

The judgment of the Sixth Circuit should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

EDWARD JEROME HARBISON,

Petitioner,

v.

RICKY BELL, WARDEN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF CURRENT AND FORMER GOVERNORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF CURRENT AND FORMER GOVERNORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

The following Current and Former Governors respectfully submit this brief as *amici curiae* in support of the petitioner:[1] Garrey E. Carruthers, former Governor of New Mexico; Richard F. Celeste, former Governor of Ohio; John J. Gilligan, former Governor of Ohio; James B. Hunt, Jr., former Governor of North Carolina; Gary E. Johnson, former Governor of New Mexico; Joseph E. Kernan, former Governor of Indiana; James G. Martin, former Governor of North Carolina; Ted Strickland, current Governor of Ohio; John Fife Symington, III, former Governor of Arizona; James R. Thompson, former Governor of Illinois; and Dick Thornburgh, former Governor of Pennsylvania.

INTEREST OF *AMICI CURIAE*

As Governors of States that employ the death penalty, *Amici* have had the responsibility under state law to make decisions on whether to pardon or reduce the sentence of persons sentenced to death. That experience gives *Amici* a unique perspective on the importance of counsel to the fairness and accuracy of capital clemency proceedings. As explained

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[1] Pursuant to Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief. Letters reflecting such consent have been filed with the Clerk.

in this brief, defense counsel play a critical role in ensuring that Governors have all the information they need to fulfill their responsibility to make clemency decisions. Accordingly, where funding for counsel is not otherwise available, federal funding pursuant to 18 U.S.C. § 3599 serves as a crucial backstop, ensuring that state clemency proceedings will continue to serve their historic role as the "fail safe" of state criminal justice systems.

SUMMARY OF ARGUMENT

Amici curiae are current and former Governors of States that employ the death penalty. In that capacity, *Amici* have been charged by state law with the responsibility of making executive clemency decisions. *Amici* hold a number of different views on the death penalty, with some supporting its use, and others personally opposing it. Regardless of their personal views, however, all believe that a Governor has the responsibility to enforce the laws of his State impartially and to exercise the clemency power in a manner that promotes fairness, accuracy, and public confidence in the criminal justice system.

Based on their experience, *Amici* agree that defense counsel play a vital role in ensuring that Governors obtain the information they need to fulfill that responsibility. Because of the legal and factual complexity of the issues that can arise in capital clemency proceedings, it is rarely possible for clemency decisions to be fully informed without the participation of counsel. Thus, when funding for counsel is not otherwise available, federal funding of clemency counsel pursuant to 18 U.S.C. § 3599 serves as an essential backstop, ensuring that Gov-

ernors can obtain the information they need to make fully informed clemency decisions.

ARGUMENT

I. Clemency Is A Crucial "Fail Safe" In State Systems Of Capital Punishment.

"Clemency is deeply rooted in our Anglo-American tradition of law." *Herrera v. Collins*, 506 U.S. 390, 411 (1993). It "exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law." *Ex parte Grossman*, 267 U.S. 87, 120 (1925). As such, it provides the "fail safe" of the criminal justice system. *Herrera*, 506 U.S. at 415 (internal quotation marks omitted). For States that have adopted a system of capital punishment, the "fail safe" of executive clemency is essential to the fair administration of justice. As Justice Stewart explained in the plurality opinion in *Gregg v. Georgia*, 428 U.S. 153, 200 n.50 (1976) (opinion of Stewart, J.), to impose the death penalty without providing for executive clemency would be "totally alien to our notions of criminal justice." In a case involving the imposition of the death penalty, a grant of clemency can result in either a full pardon, a commutation of the death sentence, or a reprieve.

A. State Clemency Processes Provide An Opportunity For A Full Airing Of The Reasons Why Clemency May Be Appropriate.

The practice of the States attests to the crucial importance of clemency to our nation's system of criminal justice. "Every state constitution provides for an executive pardon authority." Margaret Col-

gate Love, *Relief from Collateral Consequences of a Criminal Conviction: A State-by-State Resource Guide* 18 (2006) (hereinafter "Love"); *see id.* at 22-36 (describing States' practices).

Moreover, States have adopted procedures for making clemency decisions in death penalty cases that reflect the importance they attach to the clemency process. A review of those procedures bears this out. The 36 States that impose the death penalty follow three different models for making clemency decisions. *See generally* Love at 99-101; Death Penalty Information Center, *Death Penalty Policy By State*, *available at* http://www.deathpenaltyinfo.org/death-penalty-policy-state. More than half of those States give the Governor ultimate authority to make executive clemency decisions, often assisted by an administrative agency. *See id.* at 23.[2] Nine States have a "hybrid" system in which the Governor exercises the clemency power after prior approval by an administrative board. *Id.* at 28-29; *see generally id.* at 99-101.[3] The remaining six States give clemency

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[2] Those States are: Alabama, Arkansas, California, Colorado, Indiana, Illinois, Kansas, Kentucky, Maryland, Mississippi, Missouri, New Mexico, North Carolina, Ohio, Oregon, South Carolina, South Dakota, Tennessee, Virginia, Washington, and Wyoming. Love at 32-36. Four of those States require the Governor to consult with an administrative body that issues a nonbinding recommendation. *See id.* (describing Arkansas, Kansas, Missouri, and Ohio). The other 17 States leave the decision to the Governor alone. *Id.* Two States, Alabama and South Carolina, provide the executive with such discretion *only* in capital cases. *Id.* at 23 n.39.

[3] In Arizona, Delaware, Idaho, Louisiana, Montana, New Hampshire, Oklahoma, Pennsylvania, and Texas, the Governor may grant clemency only with the prior approval of an admin-

authority to an administrative agency, either "an independent board of gubernatorial appointees" who serve for limited terms, *id.* at 23-24, or "a board composed of elected or appointed state officials that includes the Governor as a member," *id.* at 26.[4]

In all three systems, the clemency process is generally triggered when an inmate files an application either directly with the Governor, *e.g.*, N.C. Gen. Stat. § 147-21, or with a body that is directed to gather information or make recommendations about clemency requests. *See generally* Love Appendix B. From there, the States consider the applications in a number of different ways.

A number of States expressly provide for some kind of hearing. For example, at least eight States require a public hearing before a request for clemency may be granted in a capital case. *See* Ala. Code § 15-22-23(b)(1)-(2); Ariz. Admin. Code §§ R5-4-102, R5-4-201; Idaho Const. art. IV, § 7; La. Rev. Stat. Ann. § 15:572.4(B)(1); Okla. Stat. tit. 57, § 332.2(G); Okla. Admin. Code § 515:1-7-1(a); Mont. Code Ann. § 46-23-302; Mont. Admin. R. 20.25.902(3); 37 Pa. Code § 81.231(b); Utah Admin. Code r. 671-312-3,

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istrative agency. Love at 23 n.39, 28-30. Idaho uses a hybrid system for certain serious offenses, such as murder. *Id.* at 23 n.39. In New Hampshire, the Governor exercises the clemency power subject to the advice and consent of the elected "Executive Council." *Id.* at 23 n.38; *see* N.H. Const. pt. 2, art. 52; *id.* pt. 2, art. 60; N.H. Rev. Stat. Ann. §§ 4:21 to 4:28 (governing Executive Council).

[4] Those States are Connecticut, Florida, Georgia, Nebraska, Nevada, and Utah. Love at 23-24, 26. The Governor is included on the decision-making board in Florida, Nebraska, and Nevada. *Id.* at 26.

671-302-1. Illinois mandates a public hearing upon request, *see* 730 Ill. Comp. Stat. 5/3-3-13, and Florida likewise requires a hearing in a capital case whenever a member of the Board of Executive Clemency (which includes the Governor) requests one. Fla. Admin. Code r. 27, Appendix Rules of Executive Clemency, Rule 15(E)-(F). South Carolina and Indiana also require hearings, though they need not be public. *See* S.C. Code Ann. §§ 24-21-30, 24-21-50; Ind. Code. § 11-9-2-2(b). And in Delaware, the Board of Pardons holds open sessions at which it requests the presence of a representative from the office of the Attorney General. *See* Del. Code Ann. tit. 11 § 4361(d); Delaware Board of Pardons, Rules of the Board, Rule 8, *available at* http://pardons.delaware.gov/information/pardrule.shtml.

With respect to the role of counsel at clemency proceedings, several States expressly provide that an applicant may be represented by counsel. *See, e.g.*, Ariz. Admin. Code § R5-4-102; 158.00.02-001 Ark. Code R. Ch. XVIII § 5; 730 Ill. Comp. Stat. 5/3-3-13; Fla. Stat. Ann. §§ 27.51(5)(a), 27.5304(5)(b); 37 Pa. Code § 81.232; S.C. Code Ann. § 24-21-50; *see also* Utah Admin. Code r. 671-312-3(2)(a) (requiring petition to include name and address "of any attorney" who is assisting petitioner). Other States effectively leave the role of counsel to be determined by the Governor or the administrative body responsible for making clemency decisions. *See, e.g.*, Ky. Const. § 77 (providing Governor with absolute discretion to "commute sentences, grant reprieves and pardons"). In practice, therefore, many, if not all, States allow counsel to play an important role.

At the completion of the process, a few States require a formal decision on the clemency application. *See, e.g.*, Utah Admin. Code r. 671-312-3(10) (requiring Board in capital case to "reconvene in open session to announce and distribute its written decision"). Other States go further and require a statement of reasons for the decision, Ky. Const. § 77, or reasons for the decision when clemency is granted, *see* Del. Const. art. VII, § 1; Ohio Const. art. III § 11; Mont. Code Ann. § 46-23-316, or denied, *see* Conn. Gen. Stat. § 54-124a(j)(3).

Despite their differences, the States' procedural schemes have one thing in common: they all lend themselves to a full exploration of the issues that bear on whether a person sentenced to death should be granted clemency or have his sentence carried out.

B. Governors Consider A Broad Array Of Fact-Intensive Issues When Deciding Whether Clemency Is Appropriate In Capital Cases.

In practice, the States strive to achieve the goal of thoroughly examining the complicated factual and legal issues underpinning capital clemency determinations. Statements and actions of particular Governors illustrate the commitment that all Governors share to making the clemency process the "fail safe" envisioned by this Court. For example, former Governor Parris Glendening of Maryland stated that he would not move forward with an execution if he had "any level of uncertainty" as to the guilt of a defendant. Henry Weinstein, *Maryland Governor Calls Halt to Executions*, Los Angeles Times, May 10, 2002

(hereinafter "Weinstein"). Former Governor Paul Patton of Kentucky emphasized his desire to assure uniformity and "promote justice" in the clemency process. Statement from Governor Patton (Nov. 25, 2003), *at* http://www.e-archives.ky.gov/_govpatton/search/pressreleases/2003/pardonstatement112503.htm. And former Governor Bob Taft went so far as to direct the Ohio Parole Board to consider the case of a man who did not apply for clemency and to consider thoroughly all the available evidence. *See, e.g.*, Statement of Ohio Governor Bob Taft Denying Clemency to Stephen Vrabel (July 12, 2004), App. at 1a.

In order to fulfill their responsibility to examine scrupulously each application for clemency in a capital case, Governors engage in a fact-specific inquiry into the circumstances of each case. The nature of the general questions that must be resolved in a clemency proceeding demand such a wide-ranging inquiry. For example, there is ordinarily no way to decide whether there is sufficient doubt about a death row inmate's guilt to warrant a full pardon without meticulously examining all the facts of the case. Similarly, an inquiry into all the circumstances of a capital case is required to decide whether that applicant has the degree of culpability that warrants the punishment of death, rather than a lesser sentence.[5]

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[5] *See, e.g.*, Miguel Bustillo, *Gov. Calls Off Texas Execution*, Los Angeles Times, Aug. 31, 2007, at A-15 (explaining that Texas Governor Rick Perry commuted sentence of inmate Kenneth Foster, Jr., whose co-defendant pulled the trigger in the fatal shooting for which the inmate was sentenced to death, and noting the Governor's statement that he was "concerned

Governors also consider a broad range of more specific issues in capital clemency proceedings that are highly fact-intensive. Such issues include mental illness,[6] ineffective assistance of counsel,[7] the reliability of testimony from jailhouse informants,[8] non-compliance with the Vienna Convention,[9] con-

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about Texas law that allows capital murder defendants to be tried simultaneously").

[6] *See* Dena Potter, *Inmate Spared: Va. Governor Grants Clemency Day Before Execution*, Associated Press, June 9, 2008 (noting that Governor Kaine commuted "the sentence of a death row inmate [(Percy Walton)] with a history of mental issues" whose "attorneys claim[ed] he suffers from schizophrenia"); Press Release, Office of the Governor, *Governor Schwarzenegger Denies Clemency to Convicted Murderer Donald Beardslee* (Jan. 18, 2005), *available at* http://gov.ca.gov/press-release/2342/ (rejecting claims, presented "[w]ith the assistances of [the applicant's] attorneys," that Mr. Beardslee suffered from mental impairment and that death was a disproportionate punishment given his role in the crime).

[7] *See, e.g.*, John Stamper, *101 Get Pardons, Commutations: GOP Governor's Final Acts*, Lexington Herald-Leader, Dec. 11, 2007 (describing Governor Ernie Fletcher's commutation of sentence for death-row inmate Jeffrey Devan Leonard, whose counsel did not know his name during the trial, admitted to having done little to investigate the case, and was later charged with perjury for having claimed that he had handled four death penalty cases before Leonard's, *see* Brett Barrouquere, *Supreme Court Rejects Inmate Appeal*, Kentucky Post, June 5, 2007).

[8] *See* Press Release, Office of the Governor, *Governor Schwarzenegger Denies Clemency to Convicted Murderer Michael Morales* (Feb. 17, 2006), *available at*: http://gov.ca.gov/press-release/463.

[9] *See* Statement of Governor Brad Henry of Oklahoma Commuting Sentence of Osbaldo Torres (May 13, 2004), *available at* http://www.governor.state.ok.us/display_article.php?article_id=201&article_type=1&print=true.

cerns regarding whether the death sentence is being applied evenhandedly with respect to race,[10] and the effect of remorse and possibility of redemption.[11] In one recent petition the Governor was required to scrutinize carefully 20 years of proceedings to evaluate whether the evidence raised sufficient doubt about the applicant's responsibility to warrant commutation of the death sentence.[12]

The clemency inquiry in a death penalty case is not only fact-intensive; it is resource-intensive as well. Much of the information that bears on a clemency decision may be in existing court records. But there may also be highly relevant information that does not appear anywhere in existing records, and that will only come to light through further investigation. Regardless of its source, the relevant information must be assessed for its reliability, and it must be organized and presented in a way that ensures that its significance will not be missed. Only through this kind of process can Governors fulfill

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[10] *See* Weinstein, *supra* (describing stay of execution and general moratorium issued by Maryland Governor Parris Glendening).

[11] *See* Daniel T. Kobil, *Should Mercy Have a Place In Clemency Decisions?*, in Austin Sarat & Nasser Hussain, *Forgiveness, Mercy, and Clemency* 43-44 (2007) (describing Georgia Board of Pardons and Paroles' commutation of death sentence of William Neal Moore, a death row inmate who expressed remorse to the family of his victim immediately after his arrest, underwent a religious conversion on death row, and reached out to others through prison ministry).

[12] Statement of Governor Ted Strickland of Ohio Commuting Sentence of John G. Spirko (Jan. 9, 2008), *available at*: http://governor.ohio.gov/Default.aspx?tabid=568.

their responsibility to make capital clemency decisions that are as fair and accurate as possible.

II. Attorneys Play A Vital Role In The State Clemency Process In Capital Cases.

Amici believe that, for state clemency proceedings to serve their historic "fail-safe" function in capital cases, the participation of counsel is vital. Without counsel, there is a serious risk that Governors and the responsible administrative bodies will not obtain the information they need to make fully informed clemency decisions.

It has long been recognized that applicants for clemency are rarely able to present their case effectively when they are unassisted by counsel. Almost 90 years ago, an expert on the clemency process put it this way:

> An observer at clemency hearings who notes the illogical, unsystematic, and haphazard manner in which pleas are made by uneducated, poorly prepared, and frightened relatives and friends in behalf of applicants cannot help feeling that the cause of the applicant is often poorly presented.

Christen Jensen, *The Pardoning Power in the American States* 54 (1922).

That same expert pointed out the critical role that counsel can play in presenting the case for clemency:

> If, in the place of these persons, a capable and conscientious attorney could take charge of the case, present evidence

> systematically, and logically argue the cause of the applicant, there is reason to believe that the authorities would be in possession of fuller evidence than is now the case in many states.

Id.

The advantages of counsel presenting the case for clemency are especially pronounced in cases involving capital defendants. As the ABA has explained, "[m]any capital defendants are . . . severely impaired in ways that make effective communication difficult." ABA Death Penalty Guidelines 10.5 cmt. Empirical evidence supports that conclusion. *See, e.g.*, Mark D. Cunningham & Mark P. Vigen, *Without Appointed Counsel in Capital Postconviction Proceedings: The Self-Representation Competency of Mississippi Death Row Inmates*, 26 Crim. Justice and Behav. 293, 300-01 (1999) (studying 44 death-row inmates in Mississippi, 84 percent of whom performed at or below a sixth-grade level in reading comprehension and who, on average, scored at roughly the tenth percentile in terms of intelligence as measured by "verbal IQ"); Richard M. Bonnie, *Mentally Ill Prisoners on Death Row: Unsolved Puzzles for Courts and Legislatures*, 54 Catholic U. L. Rev. 1169, 1192 (2005) (estimating that 5-10 percent of death-row inmates are "seriously" mentally ill). A death row inmate's incarceration also severely constrains his ability to conduct any additional investigation that could uncover new evidence supporting his clemency application.

Experience bears out the importance of counsel to the clemency process, particularly in cases involving

persons who have been sentenced to death. When two commentators sought to compile a list of cases in which individuals were found to have been wrongly convicted of capital crimes, they discovered that, "[i]n by far the largest proportion of [these] cases . . . the error was exposed through the dogged efforts of defense counsel." Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 Stan. L. Rev. 21, 67 (1987).

The fact-intensive nature of the issues that are raised in clemency proceedings involving the death penalty also confirms counsel's vital role. *See supra* pp. 8-10 (identifying issues). When complex issues of this kind arise in a courtroom, it is obvious that their effective presentation requires the assistance of counsel. The same is true when the forum for resolving the issues shifts to the Governor's office.

Counsel's participation also helps ensure that Governors will obtain all the information they need to make a fair and accurate clemency decision. Governors usually have access to government counsel who will provide information from the existing record that supports carrying out the sentence. They do not, however, typically receive from those attorneys the information and arguments that would support a grant of clemency. Thus, defense counsel are especially qualified to conduct whatever additional investigation is needed and to organize and present the information in favor of clemency so that it will be most useful to Governors. Defense counsel also serve the further role of eliminating from any presentation extraneous and unmeritorious issues. The participation of counsel for the applicant thus fills a gap and ensures that Governors will make

their decisions based on the most complete information available.

Four examples of the process that preceded clemency decisions underscore the importance of counsel to the clemency process in cases involving the imposition of the death penalty. Two examples involve cases in which attorneys were able to establish the applicant's innocence; one involves a case in which attorneys were able to show that the death sentence should not be imposed; and one involves a case in which attorneys were unsuccessful in obtaining clemency. All four illustrate why counsel are so important to the clemency process.

1. The first involves the case of Charles F. Stielow, who was sentenced to death in New York for murder based largely on a purportedly voluntary oral confession that he refused to sign when put in writing. Edwin M. Borchard, *Convicting the Innocent* 245-47 (1932). When Stielow maintained his innocence after his conviction, attorneys discovered new evidence suggesting that another man had committed the crime. *Id.* at 248-250. It was too late for a new trial, however, so "[e]xecutive clemency . . . [was] the only recourse." *Id.* at 250. "[T]he whole matter was fervently presented [by counsel] to Governor [Charles] Whitman," who held a hearing on the case and commuted Stielow's sentence to life imprisonment. *Id.* Upon the discovery of additional exculpatory evidence, the Governor appointed "an experienced criminal lawyer, and a leader of the state bar" to investigate the case. *Id.* at 251. That investigation led to evidence that proved that the description of the shooting in Stielow's alleged confession was "a physical impossibility." *Id.* at 251-52.

Convinced that "there was gross error" in Stielow's conviction, Governor Whitman had him released from the penitentiary "as an innocent man." *Id.* at 253.

2. The recent grants of clemency to Virginia death row inmate Earl Washington, Jr., similarly illustrate how the marshalling and organized presentation of detailed factual information can be of crucial importance to Governors making clemency determinations in capital cases. Mr. Washington is a mildly-retarded man who was convicted of a 1982 rape and murder based largely on his confession while in prison for other offenses. Shortly before his scheduled execution, his attorneys argued that newly-obtained DNA testing raised doubts about whether Washington had committed the crime. *See* Frank Green, *Washington's Death Sentence Commuted New Trial Could Occur If State Law Is Changed*, Richmond Times Dispatch, Jan. 15, 1994, at A1. Governor Douglas Wilder "thoroughly review[ed] the evidence in the case," including hearing testimony where defense counsel presented arguments on Washington's behalf, and "conditional[ly] pardoned" Washington such that he could, upon acceptance of the pardon, receive a sentence of life imprisonment. Statement of Virginia Governor Lawrence Douglas Wilder Granting Conditional Clemency to Earl Washington, Jr., at 3 (Jan. 14, 1994), App. at 9a-10a.

Because Washington had confessed to the crime, however, Governor Wilder did not immediately release him from prison. Attorneys for Washington eventually were able to persuade Governor James Gilmore that "a jury afforded the benefit of DNA

evidence and analysis . . . would have reached a different conclusion regarding" Washington's guilt and thus obtained for Washington an absolute pardon. Statement of Virginia Governor James S. Gilmore, III, Granting Absolute Pardon to Earl Washington, Jr., at 2 (Oct. 2, 2000), App. at 15a-16a. After another man pled guilty to the crimes for which Washington had been convicted, moreover, Governor Timothy Kaine issued a revised pardon that reflected "Mr. Washington's innocence" of the crimes. Statement of Virginia Governor Timothy M. Kaine, Granting Revised Absolute Pardon to Earl Washington, Jr., at 2 (July 3, 2007), App. at 19a.

3. Attorneys can be equally important to the clemency process when the death row inmate's innocence is not established, but a claim is made that capital punishment should not be imposed. This was the case for Anson Avery Maynard, who was convicted of murder and sentenced to death in North Carolina. *Maynard v. Dixon*, 943 F.2d 407 (4th Cir. 1991). Maynard petitioned Governor James Martin for clemency with the assistance of several attorneys. App, *infra*, at 3a. The Governor heard from "attorneys and witnesses on both sides," as well as family members of both Maynard and his victim. The case required the Governor to "sift[] through a complex mixture of ambiguous evidence, some of which was not available for presentation to the jury which convicted" and "some of which may not have even been admissible in a court of law." *Id.* at 3a-4a. Because there was "reasonable doubt in [the Governor's] mind as to whether the degree of involvement of [Maynard] in the murder of Stephen Henry [was] sufficiently clear to justify the death penalty," he

commuted the sentence to life in prison. *Id.* at 5a. In his decision, Governor Martin praised the efforts of "post-conviction defense counsel . . . to find every shred of evidence to support the petition for clemency." *Id.* at 4a.

4. An attorney's role in the capital clemency process is critical even when the request for clemency is ultimately denied. An attorney's ability to investigate, frame issues for consideration, and thoroughly present a petition on the applicant's behalf ensures that the decision to apply the death penalty is not made until an inmate has had every opportunity to demonstrate that the sentence is not warranted in his case. When an individual who is facing execution is afforded such representation, it promotes public confidence in the fairness and accuracy of the State's criminal justice system.

The decision of California Governor Pete Wilson denying Thomas Martin Thompson's application for clemency is illustrative. The attorneys in that case had argued for clemency on numerous grounds, including: (1) new evidence that he had not raped the victim, including testimony presented by an accomplice at the accomplice's parole hearing; (2) questions about "the veracity of jailhouse informants"; (3) inconsistent closing arguments made by prosecutors at his and his accomplice's trial, which called into question the State's case; and (4) an *amicus* brief prepared by the attorneys and submitted on behalf of seven former prosecutors and two jurors who expressed their doubts about Thompson's conviction. California Commission on the Fair Administration of Justice, *Clemency in Capital Cases*, Appendix C 15 (June 30, 2008). Governor Wilson specifically noted

"the diligent and skillful efforts" of Thompson's attorneys in handling the application. *Id.* at 21. Although the Governor ultimately rejected the application, the attorneys' skillful representation and the Governor's ten-page, single-spaced statement considering each of the grounds raised ensured that Governor Wilson had thoroughly explored every argument for mercy before the sentence was carried out.

III. Section 3599 Provides A Critical Backstop That Ensures Representation For Capital Defendants In The State Clemency Process.

In some States, funding is available for counsel in clemency proceedings. Where funding is not available, however, federally funded clemency counsel is a backstop that ensures that counsel will be present and that Governors may obtain the information they need to make fully informed clemency decisions in capital cases.

Contrary to the view of the Solicitor General (*see* Br. for U.S. as *amicus curiae*, Pet. Stage, at 11-23), the fact that counsel is appointed by a federal court does not reflect an intrusion on state sovereignty. States have wide discretion in determining how to exercise clemency, *see Ohio Adult Parole Authority v. Woodward*, 523 U.S. 272, 282 (1998), including absolute control of what role Section 3599 attorneys will play in each case. There is no reason to anticipate that federal courts would seek to intrude on such constitutionally authorized state determinations.

Indeed, the state clemency process significantly benefits when the same attorney who is funded to

represent a defendant in federal habeas proceedings is allowed to continue that representation in the state clemency proceeding. That attorney will almost always have the most complete information bearing on an inmate's petition for clemency – and thus will be in the best position to assist the Governor in making a fully informed decision. Federal funding under Section 3599 thus helps to ensure that state clemency proceedings will continue to serve their historic role as the "fail safe" of state criminal justice systems that employ capital punishment.

CONCLUSION

For the reasons discussed, defense counsel play a vital role in capital clemency proceedings, and federal funding for such counsel helps to ensure that Governors obtain the information they need to make fair and accurate clemency decisions.

Respectfully submitted,

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September 15, 2008

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APPENDIX A

NEWS RELEASE
GOVERNOR BOB TAFT

TAFT RELEASES STATEMENT CONCERNING CLEMENCY FOR STEPHEN VRABEL

COLUMBUS (July 12, 2004) - Today, Governor Bob Taft issued the following statement concerning clemency for Stephen Vrabel:

On March 3, 1989, Stephen Vrabel shot and killed his common-law wife and daughter and placed them in a refrigerator/freezer, where they remained until discovered a month later by a family member. In 1994, he was found competent to stand trial, and a jury convicted him on two counts of aggravated murder with specifications. Since then, Ohio courts have upheld the convictions and the death sentence. On March 19, 2004, following several competency examinations, the trial court granted Mr. Vrabel's request to waive any future appeals.

Although Mr. Vrabel did not apply for clemency, I directed the Ohio Parole Board to consider his case and provide a clemency recommendation to me. While neither Mr. Vrabel nor his attorneys chose to present evidence at the hearing, the Board nevertheless considered all available evidence. In a unanimous (8-0) opinion, the Board recommended that I not grant clemency. After careful consideration of judicial opinions, recommendations and arguments of the Attorney General's Office, the mental health history of Stephen Vrabel, and other relevant materials, I have

decided not to invoke the power of executive clemency.

Mr. Vrabel is guilty of the murders of Susan and Lisa Clemente, and the aggravating circumstances of his crimes outweigh any mitigating factors. For these reasons, I concur with the decision of the Parole Board and choose not to commute Stephen Vrabel's sentence.

"May God bless the family and friends of Susan and Lisa Clemente."

APPENDIX B

STATE OF NORTH CAROLINA
OFFICE OF THE GOVERNOR

Release: IMMEDIATE Date: January 10, 1992
Contact: Nancy Pekarek Distribution: Statewide
Joanne Latham

GOVERNOR COMMUTES ANSON MAYNARD'S DEATH SENTENCE TO LIFE WITHOUT PAROLE

RALEIGH -- The following is Governor Jim Martin's statement concerning the commutation of Anson Avery Maynard's death sentence to life in prison without parole.

After lengthy, prayerful consideration, I have decided to commute the death sentence of Anson Avery Maynard to life imprisonment without parole. Anson Maynard was convicted of murdering Stephen Henry on June 13, 1981 in Fayetteville, North Carolina. After all appeals were exhausted, the date of January 17, 1992, was set by the courts for the State to carry out the death sentence, and a written appeal for clemency was received by me as Governor of North Carolina on November 22, 1991.

I have heard attorneys and witnesses on both sides, as well as family members of both Stephen Henry and Anson Maynard. I have sifted through a complex mixture of ambiguous evidence, some of which was not available for presentation to the jury

which convicted Anson Maynard, and some of which may not have even been admissible in a court of law.

No physical evidence ties Anson Maynard to the scene of the crime or to the commission of the crime. The only direct witness to testify that Maynard pulled the trigger was Gary Bullard, an admitted participant in the murder who was given immunity from prosecution in return for his evidence and testimony against Maynard. Given the information available at the time, the jury accepted Bullard's version over Maynard's.

After extensive review of all of the claims and counterclaims, I am not convinced that Anson Maynard pulled the trigger to kill Stephen Henry. Nor am I convinced that Anson Maynard is totally innocent.

Since it is not clear to me that he was the murderer, I conclude that the most appropriate use of the power of clemency vested in my office is to decide that the state of North Carolina will not carry out the execution of Anson Maynard. Because it is not clear on the basis of all I have read and heard that Anson Maynard was not the murderer, I conclude that he should remain in prison for the rest of his life.

The record is clear that the courts have done their duty under the powers and procedures of the courts. Law enforcement has done its duty to use the evidence available to support a conviction. The post-conviction defense counsel has worked hard to find every shred of evidence to support the petition for clemency. The Attorney General's office has

worked hard to uncover any information or response supporting the original verdict and sentence. I have done the best I can to reach an understanding of what truth can be found in all this.

I want it clearly understood that my actions do not indicate any tolerance on my part, or of the State of North Carolina, of murder in this state, especially the murder of a person who has indicated a willingness to assist the state through testimony against another person. The willingness of citizens to offer testimony is essential to the prosecution of the guilty and it is a function of government to protect witnesses from harm. Where the evidence is clear, we should not hesitate in carrying forth swift, sure justice, including execution.

I appreciate the efforts of the jury to arrive at the truth. There was much conflicting evidence presented to them in 1981 and we all respect the decision they reached at the time based upon what they saw and heard. It is only with the benefit of additional time, and with information that they may not have had available, that my decision modifies their sentence.

There is reasonable doubt in my mind as to whether the degree of involvement of Anson Avery Maynard in the murder of Stephen Henry is sufficiently clear to justify the death penalty. For that reason, I have commuted Anson Maynard's death sentence to life in prison without parole. It is for cases like this that the power of clemency is given to the governor.

– End –

APPENDIX C

COMMONWEALTH of VIRGINIA
Executive Department

TO ALL WHOM THESE PRESENTS SHALL COME - GREETINGS:

In accordance with the powers granted to me as Governor of Virginia under Article V, Section 12 of the Constitution of Virginia, I, **Lawrence Douglas Wilder**, do hereby reach the following conclusions and render the following conditional pardon:

Earl Washington Jr., was brought to trial in the Circuit Court of the County of Culpeper for the murder of Rebecca Lynn Williams with premeditation subsequent to the commission of rape. He was tried by a jury of his peers and found guilty as charged and it fixed his punishment at death. On March 20, 1984, at a sentencing hearing in which the probation officer's report was considered, the **Honorable David F. Berry** entered a final order imposing the death sentence. Since that time, the defendant's case has gone through numerous appeals both within the courts of the Commonwealth and the United States. No court before which an appeal has been presented has granted the complete relief that **Earl Washington, Jr.** has sought.

A review of the record of the trial and of the appeals that were taken demonstrate that **Earl Washington, Jr.** received a fair trial and his appeals were well presented and considered. Recently, newly discovered evidence has become

available as the result of initiatives of the Attorney General's Office. It is clear from precedent in past cases and based upon discussion with the Attorney General's Office and counsel for **Earl Washington, Jr.** that there are no provisions under Virginia law whereby such newly discovered evidence can now be considered by the courts. Accordingly, the review of and consideration of such evidence can be made only by the Office of the Governor, and it is this Office that is the sole entity that has the authority and power to decide upon its merits and, if appropriate, intervene into and prevent the execution of **Earl Washington, Jr.**

Earl Washington, Jr., through counsel, has petitioned my Office with the request that I invoke the clemency powers granted to me under Article V, Section 12 of the Constitution of Virginia, grant him clemency in the form of an absolute pardon, and allow him good time for the time he has served on two consecutive fifteen year sentences he received for statutory burglary and malicious wounding after pleading guilty to same in the Circuit Court for the County of Fauquier on May 1, 1984. The pleas of guilt were the result of a plea bargain concerning six indictments which included two counts of malicious wounding, two charges of robbery, one charge of rape, and one charge of breaking and entering. The charges involved three different victims.

The newly discovered evidence was the result of DNA testing of biological samples that had been taken from the body of the victim in the case for which he received the death penalty. These samples were tested by the Virginia Division of Forensic Science. The results were discussed with **Dr. Paul**

B. Ferrara, Director of the Division. He confirmed that alleles (DNA characteristics) matching the victim, her husband, and **Earl Washington, Jr.** were found during the testing process. In addition, however, an allele was discovered which matched none of these persons. That raises a substantial question because the victim in dying declaration stated that she was attached by a lone black man whom she did not know. Defense argues that that person could not have been **Earl Washington, Jr.** because the unaccounted for allele does not match him and that proves that the contributor of that allele had to belong to the attacker. Defense counsel supports this by pointing to the trial testimony rendered by a reputable and competent doctor who testified that the biological materials he sampled had to have been deposited within between one and twelve hours of the victim's death. Defense argues that there was no other opportunity for the unaccounted for allele to have been deposited in that time period other than by the attacker.

Even with this new evidence, however, questions continue to remain concerning the independent validity and strength of other evidence, including the confession of **Earl Washington, Jr.** His defense counsel argues that his confessions are of no merit because he is mentally retarded and he was led into the confessions by the police who conducted the investigations. Nevertheless, a review of the trial evidence, including the confessions of **Earl Washington, Jr.** reveals that he had knowledge of evidence relating to the crime which it can be argued only the perpetrator would have known. The United States Court of Appeals for the Fourth Circuit discusses the specifics of this

knowledge and confirms that he "knew so much about this crime that a jury could afford his confessions substantial probative weight." *Washington v. Murray*, No. 92-4008, slip op. at 10 (4th Cir. Sept. 17, 1993). See also *Id.* at 10-11 for the Court's review of that evidence.

I have thoroughly reviewed the evidence in the case, the petition that has been submitted on behalf of **Earl Washington, Jr.**, the interviews my Office has had with the prosecutor, the detective who is most knowledgeable about the case, **Dr. Ferrara**, the forensic scientist, other knowledgeable persons, all of the orders and opinions of the various courts for both the Commonwealth and the United States, and the results of the hearing wherein defense counsel presented its case to this Office. It is also a matter of common knowledge that I have been subjected to significant pleas from a number of members of the General Assembly as well as persons from across the United States and other parts of the world to grant the request of **Earl Washington, Jr.** While they have been sincere and well meaning in their expressions of concern on behalf of the petitioner, it is clear that the large majority do not enjoy a grasp of the specific facts in this case. Accordingly, while I appreciate these expressions of opinion, as I have stated on other occasions, I must be ever mindful that the powers granted to the Governor by the Constitution cannot be implemented based upon popular appeal, nor can such a decision be implemented in a manner that sacrificially abridges the law. To the contrary, it must emanate from a thorough review of each case, be based upon the evidence presented, and rest its authority upon established principles of law.

Moreover, a governor must remain cognizant of the precept that the powers granted must me carefully husbanded in order to assure that they not meet with abuse.

In reaching my decision on the issue of clemency in this case, once again I have recognized the sanctity normally extended to each branch of government and the inherent obligation to maintain the dignity accorded to the separation of powers.

Taking into consideration all of the foregoing, I am of the opinion that the newly discovered evidence interjects an important element into the case which neither the jury that tried the case nor the courts which have reviewed it since the trial have had the opportunity to consider. Had that opportunity arose, I am of the opinion that their opinions as to the appropriate conclusion may have been different.

NOW THEREFORE, in light of the foregoing I have determined that, while there are those who enjoy reasoned and conscientious minds who may differ, I am the one who must reach the ultimate decision; accordingly, based upon all of the foregoing I do hereby grant **Earl Washington, Jr.**, the following **CONDITIONAL PARDON:**

(1) I acknowledge that statutory language exists to the effect that those persons sentenced to death are not eligible for parole if their sentence is commuted to life imprisonment. Notwithstanding this factor, as I have stated on previous occasion, I do not view such language as a constraint to the powers granted to me by the Constitution under

Article V, Section 12. I have concluded that the powers granted to me supersede any direct or implied attempt to restrict such powers through a statutory enactment. Accordingly, I hereby commute the sentence of death for the capital murder conviction to life imprisonment with the right of parole. His parole eligibility shall be determined by the appropriate authorities. When making that determination they shall consider both the thirty year sentence he is now serving for unrelated offenses, as well as, the offense for which he originally received the death penalty and which I am now commuting.

(2) The capital punishment commutation is conditioned upon **Earl Washington, Jr.** maintaining good conduct and cooperating with Virginia Department of Corrections officials; accordingly, if at any time during his imprisonment he shall be guilty of a felony, including the attempt to escape, this commutation shall be rendered null and void and revised to the extent that he shall thereafter serve a life sentence without parole, unless such misconduct on his part leads to a sentence from a court that dictates a more stringent sentence; and

(3) I do hereby further implement my clemency powers to the extent that nothing contained herein is to be deemed to preclude **Earl Washington, Jr.** from taking advantage of the opportunity to present the aforementioned new evidence and have his case retried from the inception under new provisions for newly discovered evidence which I encourage the General Assembly to adopt at its 1994 Session. I acknowledge the fact that such a

retrial could result in an outcome that is either more or less stringent than this clemency order, including the potential of an outcome in which the sentence of death could be ordered. Accordingly, in the event of such a retrial, the verdict that results and the sentence that is imposed in the event of finding of guilty shall supersede this grant of executive clemency.

(4) Before this conditional clemency grant will become effective, **Earl Washington, Jr.**, must accept its terms on or before 5:00 P.M. on January 14, 1994, by signing this document at the place designated for his signature. If he rejects this grant, either in whole or in part, the entire grant is revoked and, thereby, will be null and void and the sentence of the Circuit Court for the County of Culpeper will be carried out when so ordered by that court.

Given under my hand and the Lesser Seal of the Commonwealth at Richmond, this 14th day of January in the year of our Lord one thousand nine hundred and ninety-four and the 218th year of the Commonwealth of Virginia.

/s/ Lawrence Douglas Wilder
Governor of Virginia

{SEAL}

By the Governor:

/s/
Secretary of the Commonwealth

ACCEPTANCE OF THE CONDITIONAL PARDON

I, **Earl Washington, Jr.**, hereby accept the above **CONDITIONAL PARDON** with the conditions therein set forth.

Signature: /s/ Earl Washington Date: 1/14, 1994

State of Virginia
County of Mecklenburg, to-wit:

Subscribed and sworn to before me this 14 day of January.

APPENDIX D

COMMONWEALTH of VIRGINIA
Executive Department

TO ALL WHOM PRESENTS SHALL COME - GREETINGS:

1. In May of 1983, in Fauquier County, Earl Washington was arrested for breaking and entering the home of Mrs. Helen Weeks, a 73-year-old woman, stealing a gun and money from her, and brutally beating her with a chair after she awoke to discover him in her house. He also shot his brother with the gun he stole from Mrs. Weeks. As a result of those crimes, Washington pled guilty to a statutory burglary and malicious wounding and he was sentenced to a 30-year prison term (two consecutive 15-year prison terms) for those offenses.

2. While Washington was in custody for those criminal offenses, he was questioned about the rape and murder of Mrs. Rebecca Williams a year earlier in Culpeper County. Washington confessed to raping and murdering Rebecca Williams in her apartment on June 4, 1982.

3. Based on Washington's confession and other corroborating evidence, Washington was tried and convicted of the capital murder and rape of Rebecca Williams and sentenced to death.

4. Ten-years later, Governor L. Douglas Wilder reviewed new DNA tests of samples taken from the victim and Washington. The DNA test results were

inconclusive but did not exonerate Washington. In light of that new information, Governor Wilder commuted Washington's death sentence to life in prison with the possibility of parole.

5. On June 1, 2000, I directed the Virginia Division of Forensic Science to perform further DNA tests on evidence taken from the apartment of Mrs. Williams and her body. The purpose of these tests was to apply the most technologically advanced scientific methods to the evidence available in an effort to confirm or disprove Earl Washington's presence in the apartment of Rebecca Williams on June 4, 1982.

6. Since June 1, 2000, the Virginia Division of Forensic Science has proceeded to perform the DNA tests on all known and available evidence.

7. According to the results of the new DNA tests, Washington is excluded from semen taken from Mrs. Williams' body and his DNA could not be located elsewhere in the apartment.

8. The DNA results further revealed the semen of another person on a blue blanket taken from the scene of the crime. The DNA from semen on the blue blanket matched the DNA of a convicted rapist. However, the DNA on the blue blanket did not match the DNA of the sole sample of semen taken from Mrs. Williams' body. As a result, the Division of Forensic Science could not confirm the DNA found on the blue blanket was Rebecca Williams' rapist.

9. In my judgment, a jury afforded the benefit of the DNA evidence and analysis available to me

would have reached a different conclusion regarding the guilt of Earl Washington. Therefore, upon careful deliberation and review of all of the evidence, as well as the circumstances of this matter, I have decided it is just and appropriate to intervene in the judicial process by granting Earl Washington an absolute pardon for the capital murder and rape of Rebecca Williams.

NOW, THEREFORE, in accordance with the authority granted to me as Governor of Virginia under Article V, Section 12 of the Constitution of Virginia, I, James S. Gilmore, III, Governor of the Commonwealth of Virginia, do hereby grant unto Earl Washington an Absolute Pardon from the convictions of rape and capital murder handed down by the Circuit Court of Culpeper County on March 20, 1984.

Given under my hand and under the Lesser Seal of the Commonwealth at Richmond, this 2nd day of October in the year of our Lord Two Thousand and the 225th year of the Commonwealth of Virginia.

/s/ James S. Gilmore III
Governor

{SEAL}

Attest:

/s/ Anne O. Petera
Secretary of the Commonwealth

APPENDIX E

COMMONWEALTH of VIRGINIA
Executive Department

TO ALL WHOM THESE PRESENTS SHALL COME - GREETINGS:

1. On June 4, 1982, Rebecca Williams was raped and stabbed in her home in Culpeper, Virginia, and died a short time later in a local hospital. At an autopsy, various samples were taken. Additional evidence was collected from the crime scene at the Williams home.

2. Approximately a year later, Earl Washington, Jr., was in custody for other crimes for which he was convicted and sentenced to prison. He was questioned about Ms. Williams' rape and murder and he eventually confessed to those crimes.

3. Based on the confession and other evidence, Mr. Washington was tried and convicted of the capital murder and rape of Mrs. Williams and sentenced to death.

4. Ten years later, Governor Lawrence Douglas Wilder requested and was presented with DNA tests of samples taken from Mrs. Williams, Mr. Washington, and other physical evidence from the crime scene. The DNA tests did not exonerate Mr. Washington, but cast doubt on whether he had committed the crimes against Mrs. Williams. In light of that new information, Governor Wilder commuted

Washington's death sentence to life in prison with the possibility of parole.

5. In 2000, Governor James S. Gilmore, III directed the Virginia Division of Forensic Science to perform further DNA tests on evidence taken from Mrs. Williams' body and her residence. These tests were conducted with more advanced DNA technology that had been developed since the time of Governor Wilder's review.

6. According to the results of these DNA tests, it became evident that the semen taken from Mrs. Williams' body was not that of Mr. Washington and his DNA also could not be located elsewhere in the Williams residence.

7. The DNA results further revealed the semen of another person on a blue blanket taken from the crime scene. The DNA from that semen matched the DNA of a convicted rapist, Kenneth Tinsley. However, at the time, it appeared that the DNA on the blue blanket did not match the DNA of the sole sample of semen taken from Mrs. Williams' body, thus making it possible that there were at least two perpetrators of the crime.

8. Based on this information, Governor Gilmore granted Mr. Washington an absolute pardon on October 2, 2000, on the limited grounds that a reasonable jury would not have convicted him based on the evidence as it was then known.

9. In 2004, Dr. Edward Blake conducted new and more sophisticated DNA tests at Mr. Washington's request and expense. These DNA tests revealed that

the DNA sample from Mrs. Williams' body and the DNA that was found on the blue blanket from the crime scene both belonged to Kenneth Tinsley.

10. The reliability of Dr. Blake's DNA testing in this case was confirmed by an external audit of the Division of Forensic Science ordered by Governor Mark R. Warner.

11. In April 2007, Kenneth Tinsley pled guilty to the rape and murder of Rebecca Williams. He was sentenced to two life terms in addition to the two life terms he was already serving for a previous rape and robbery conviction.

12. Based on DNA evidence and analysis now available, and the conviction of Kenneth Tinsley for the murder and rape of Mrs. Williams, it is now evident that Mr. Washington was and is innocent of the crimes against Mrs. Williams. Therefore, upon careful deliberation and review of all of the evidence, as well as the circumstances of this matter, I have decided it is just and appropriate to grant this revised absolute pardon that reflects Mr. Washington's innocence of the rape and capital murder of Mrs. Williams.

NOW, THEREFORE, I Timothy M. Kaine, Governor of the Commonwealth of Virginia in accordance with the authority granted to me as Governor of Virginia under Article V, Section 12 of the Constitution of Virginia, do hereby grant unto Earl Washington, Jr., this revised Absolute Pardon from the convictions of rape and capital murder handed down by the Circuit Court of Culpeper County on March 20, 1984.

Given under my hand and under the Lesser Seal of the Commonwealth at Richmond, this 3rd day July in the year of our Lord Two Thousand and Seven and the 232nd year of the Commonwealth of Virginia.

/s/ Timothy M. Kaine
Governor

{SEAL}

Attest:

/s/ Katherine K. Hanley
Secretary of the Commonwealth